

Supreme Court of the United States

OCTOBER TERM, 1965

No. 440

UNITED STATES, PETITIONER

vs.

UTAH CONSTRUCTION AND MINING CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS

INDEX

	Original	Print
Record from the United States Court of Claims		
Petition	1	1
Exhibit A—(Excerpts)—Articles 3, 4, 9, 15, 16(d), and GC-25 from Contract for Construction between the United States and Utah Construction Company, dated March 19, 1953	20	15
Defendant's answer	26	19
Defendant's amended answer	48	34
Commissioner's order and memorandum re ap- plicability of Bianchi decision	53	37
Exhibits to defendant's supplemental brief (Excerpts)	76	52
Concrete Aggregate Appeal No. 121—Part 1—Letter from Atomic Energy Commis- sion to Utah Construction Company, dated December 20, 1956	76	52

Record from the United States Court of Claims—
Continued

Exhibits to defendant's supplemental brief
(Excerpts)—Continued

Concrete Aggregate Appeal No. 121—Part 2	80	57
Brief of the contracting officer on motion to dismiss Utah's appeal for its failure to make a timely pre- sentation of its claim	80	57
Decision of the Atomic Energy Com- mission in Docket No. CA-121, Oc- tober 1, 1959	87	64
Pier Drilling Appeal No. 87	102	77
Memorandum of decision	102	77
Findings of fact and recommendation..	103	78
Letters from Atomic Energy Commis- sion to Utah Construction Company, dated April 1, 1955, and April 19, 1955	120	94
Shield Window Appeal No. 76	125	99
Memorandum of decision	125	99
Findings of fact and recommendation..	126	100
Letter from Atomic Energy Commis- sion to Utah Construction Company, dated June 26, 1954	148	121
Shield Door Appeal No. 95	151	125
Memorandum of decision	151	125
Findings of fact and recommendation..	152	126
Letter from Atomic Energy Commis- sion to Utah Construction Company, dated October 27, 1955	164	138
Opinion, Whitaker, J.	167	142
Opinion, concurring, Cowen, Ch. J.	179	155
Opinion, concurring in part and dissenting in part, Davis, J.	180	156
Order extending time to file certiorari	188	164
Order allowing certiorari	189	165

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

UTAH CONSTRUCTION AND MINING COMPANY, PLAINTIFF
vs.

THE UNITED STATES, DEFENDANT

PETITION—Filed January 6, 1961

1. Plaintiff, Utah Construction and Mining Company, formerly and during the times herein-mentioned known as Utah Construction Company, is, and at all times herein pertinent was, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business in the City and County of San Francisco, State of California, now being located at 550 California Street in said City and County.

2. On March 19, 1953, pursuant to competitive unit price and lump-sum bids, plaintiffs was awarded and entered into a contract with the defendant, acting by and through the United States Atomic Energy Commission, designated Contract No. AT(10-1)-645, under which plaintiff [fol.2] was to furnish the plant, equipment, labor and materials and to perform the work, except as hereinafter alleged, for the construction of a large assembly and maintenance area at the defendant's National Reactor Testing Station in Jefferson and Butte Counties, Idaho. A copy of the contract, together with Advance Notice, Invitation No. AT(10-1)-645, Instructions to Bidders, plaintiff's bid, general conditions, special conditions, and pertinent drawings, schedules, specifications, addenda and modifications are annexed hereto as Exhibit "A" and by this reference made a part hereof.

3. In estimating its cost of the performance of the work set forth in the plans and specifications, and the

addenda thereto, of said contract, and in submitting its bid and entering into said contract for the performance of such work, plaintiff relied on defendant's express and implied representations and warranties that:

(a) all work could be completed, at the latest, within approximately one calendar year from the award of said contract, or specifically, by March 30, 1954;

(b) all equipment and materials to be furnished by defendant for the completion of said contract would be supplied to plaintiff completely designated, tested, inspected, and in a fit condition for installation or use at the respective times necessary to meet work schedules, and in the ordinary and economical course of the performance of said contract, and in accordance with the plans and specifications of said contract;

(c) all specifications and plans, shop drawings and models would be furnished at the respective times necessary to meet the work schedules, and in the ordinary and economical course of the performance of said contract;

(d) any and all decisions pertinent to changes or material alterations of the required performance under said contract would be made in a reasonable and prompt manner, so as not to interfere unduly with plaintiff's work on said project, or to interfere with or preclude the ordinary and economic course of the performance of said contract;

(e) all plans and specifications, addenda thereto, and modifications under said contract were intended and prepared to produce a desired end-result, and were complete and adequate to produce such desired end-result;

(f) all the information in defendant's possession and within its special knowledge concerning the conditions of the job-site, and the materials and equipment to be furnished by defendant was disclosed to all bidders, including plaintiff;

(g) the plans and specifications prepared by defendant were complete, and not such as to mislead as to any item of work covered by said contract;

(h) defendant would not cause plaintiff any delay in the prosecution of its work, or protract the period of perform-

ance, or interfere in the performance of its work under said control; and

(i) defendant would not make unreasonable, arbitrary or excessive inspection demands, or arbitrarily or unreasonably reject any of plaintiff's completed work, or unduly delay in approving completed phases of said contract.

[fol. 4] 4. Plaintiff promptly commenced the performance of the contract work after receipt of defendant's Notice to Proceed, dated March 19, 1953, and during the entire period of such performance under said contract, defendant failed to perform in accordance with said contract, and its express and implied warranties and representations; specifically, defendant did not formulate a desired end-result prior to its Invitation to Bidders; defendant did not prepare adequate plans and specifications for the desired end-result represented to plaintiff in said contract, or for any end-result; defendant did not furnish plans and specifications, shop-drawings, models, equipment or materials in a timely manner, or in accordance with work schedules, or in the ordinary and economical course of the performance of said contract; defendant did not furnish equipment or materials to plaintiff completely designed, tested or inspected or in a condition fit for its intended use; defendant did not disclose to plaintiff all of its information concerning known job-site conditions and government-furnished equipment and materials; defendant did not make prompt or reasonable decisions with respect to changes and material alterations of said contract; defendant interfered with and unnecessarily delayed plaintiff in the prosecution of its work under said contract; defendant arbitrarily, unreasonably and excessively demanded inspection of both plaintiff's work in progress and its completed work; defendant arbitrarily and unreasonably rejected plaintiff's work in progress and its completed work; defendant unreasonably and arbitrarily delayed approval of plaintiff's completed work on said project; and defendant intentionally misrepresented to plaintiff that the contemplated work under said contract, or subjectively contemplated by defendant, or the desired end-result under said contract, or any end-result, could be completed or produced within one calendar year.

5. As a result of defendant's said misrepresentations and failure to perform in accordance with said contract and its implied and express warranties, plaintiff did not complete its work on said project and under said contract, the subsequent modifications and the change orders, numbering one-hundred thirty-six (136) in all, until on or about January 7, 1955. All of plaintiff's work required by defendant on said project was completed within the contract time as extended by defendant.

6. As a result of plaintiff's detrimental reliance on said defendant's delays, misrepresentations and failures to perform in accordance with said contract and its implied and express warranties, including, but not limited to, the acts of defendant with respect to major phases of said contract, hereinafter referred to, which independently and cumulatively constituted a breach of contract by defendant (subparagraphs 7(a), (b), (c), (d) and (e) herein), plaintiff was obliged to pay increased excavation costs in the amount of \$17,734.63, added shield door costs in the amount of \$4,457.24, increased concrete finishing costs in the amount of \$109,356.00, added winter protection costs in the amount of \$183,431.46, added administrative, overhead and equipment costs in the amount of \$216,717.63, added labor costs in the amount of \$79,844.18, and added excessive inspection costs in the amount of \$55,000.00. None of the additional costs referred to herein would [fol. 6] have been incurred by plaintiff except for said failures of defendant to perform in accordance with said contract, representations and implied and express warranties.

7. The delayed completion date of said contract, and the increased costs to plaintiff herein referred to were due in large part, but not limited to, the following acts of defendant on the following specific phases of said contract:

(a) *Pier Drilling*—Included in plaintiff's contract with defendant, Exhibit "A" hereto, was the drilling and excavation for "piers" or foundation shafts for certain buildings to be constructed by plaintiff. In drilling the shafts for the piers, plaintiff's subcontractor encountered, on or about June 1, 1953, conditions differing materially

from those indicated in the contract documents, namely, "float rock" (individual rocks of various sizes, detached from the principal bedrock by glacial or geological action and subsequently covered by silt suspending such rocks below the surface of the ground). Such changed conditions delayed excavation procedures to such an extent that plaintiff was forced to protect and perform subsequent concrete work in inclement winter weather.

On or about February 18, 1955, plaintiff claimed additional compensation in the amount of \$17,734.63 for the extra costs of drilling said "float rock". Defendant denied said claim on April 1, 1955. On or about March 31, 1955, plaintiff claimed additional compensation in the amount of \$83,431.46 and a time extension of eleven months for additional costs to cover winter protection and performance resulting from the delayed excavation. Defendant denied said claim on April 19, 1955.

[fol. 7] On or about April 27, 1955, plaintiff appealed from the above decisions to the Atomic Energy Commission's Advisory Board on Contract Appeals, which found that (1) the "float rock" encountered constituted a "changed condition" within the meaning of Article 4 of said contract, that (2) this condition caused some delay in the drilling operation, (3) that no additional cost to plaintiff resulted from such changed condition, except insofar as plaintiff was liable over to its drilling subcontractor (for which the Board recommended that the matter be remanded to the Contracting Officer to determine) and (4) that the excavation delay did not operate to delay the pouring of concrete because such latter delay was due primarily to a dispute over defendant's failure to furnish concrete aggregate of the quality specified in the contract and such aggregate dispute was not before the Board in the particular proceeding.

Defendant well knew, or should have known, of the actual subsurface soil conditions and did in fact mislead plaintiff and misrepresent such subsurface soil conditions. Further, defendant did find that some delay was attributable to the misleading specifications and misrepresentations prepared by defendant; however, defendant has not compensated plaintiff for any of its increased costs as a result thereof, namely (a) \$17,934.63 for the additional

excavation work and for a fair and reasonable apportionment of the total increased costs for added winter protection in the amount of \$183,431.46, (b) added administrative, overhead and equipment costs in the amount of \$216,717.62, (c) added labor costs of \$79,864.18, and (d) added [fol. 8] excessive inspection costs of \$55,000.00 attributable to such delay and failure to perform, to which plaintiff is fully entitled. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

(b) *Concrete Aggregate*—It was contemplated under said contract and the specifications, that plaintiff would pour approximately 18,000 cubic yards of concrete. On or about July 17, 1953, defendant suspended plaintiff's concrete mixing and pouring operations because of information received by its Contracting Officer on the project that the cement mixture being used was deficient in the strength requirements as specified by the contract (Section III, Division S-2). On or about July 21, 1953, defendant's Contracting Officer authorized resumption of work "... pending an investigation and determination of deficient strength requirements, ..."

Subsequent tests revealed that the presence of small sands, or "fines" in the concrete aggregate furnished by defendant to plaintiff caused the deficient strength. Thereafter, defendant undertook, through another contractor, to clean the aggregate and remove such condition. Further, defendant authorized plaintiff, at defendant's cost, to increase the concrete mixture by one bag of cement, thereby increasing the mixture to six, instead of the originally specified five, bags of cement per cubic yard. Such added bag of cement provided the necessary strength, but increased plaintiff's finishing costs.

On or about July 19, 1956, plaintiff presented a claim to defendant's Contracting Officer in the amount of \$109,- [fol. 9] 356.00 for additional costs incurred by plaintiff due to defendant's failure to furnish aggregate to meet the specifications imposed by section S-2 as represented in SC-18 of Exhibit "A" hereto, on the grounds that such failure was a changed condition within the meaning of Article IV of said contract.

Said Contracting Officer denied said claim on the grounds that plaintiff's claim was for breach of contract or unliquidated damages and hence not within his jurisdiction. On appeal, Docket No. CA-121, Decision dated October 1, 1959, the Hearing Examiner upheld defendant's Contracting Officer and also ruled that plaintiff's claim was not timely within the framework of the contract and that said claim was not a changed condition within the meaning of Article IV.

Due to the delays caused by defendant's failure to furnish plaintiff with concrete aggregate in accordance with said plans and specifications, plaintiff was forced to pour cement in severe and inclement winter weather at greatly increased cost. Plaintiff incurred, and is entitled to be compensated by defendant for such added costs in the amount of \$109,356.00 for extra finishing costs and for a fair and reasonable apportionment of the total increased costs of (a) added winter protection in the amount of \$183,431.46, (b) added administrative, overhead and equipment costs in the amount of \$216,717.63, (c) added labor costs in the amount of \$79,844.18, and (d) added excessive inspection costs in the amount of \$55,000.00 attributable to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the [Vol. 10] precise amounts of such apportionment have been determined.

(c) *Shield Doors*—On or about May 12, 1953, plaintiff placed orders with certain vendors for various parts necessary to the completion of the shield door installation required by the plans and specifications. In accordance with such plans and specifications, plaintiff submitted vendor's shop drawings to defendant on or about July 11, 1953 for the intended purpose of determining whether the proposed products were within the limits of contract specifications. Defendant determined that certain features not appearing on contract drawings should be added, namely, specific finish requirements, steel content, and specific arrangement and location of shield-door drive units. Defendant's insistent imposition of additional design information and ultimate partial withdrawal and reversal of such action on October 26, 1953, delayed a firm commit-

ment to said vendors from July until November 3, 1953. Due to such delay on or about February 17, 1954, plaintiff was forced to postpone the pouring of concrete shield doors, as well as the necessary concrete on the buildings and structures affected thereby, until June, 1954, or a total of four months delay. Such delay in turn delayed all phases of work, including, but not limited to, the Shield Window and Amercoat Paint delays hereinafter referred to.

On or about October 29, 1955, defendant's Contracting Officer denied plaintiff's claim for extra work and delay resulting from defendant's inadequate plans, specifications and shop drawings with respect to shield doors. On or [fol. 11] about November 3, 1955, plaintiff appealed to the Atomic Energy Commission's Advisory Board on Contract Appeals. Said Board of Appeals, in Docket No. 95, Findings of Fact and Recommendations dated April 25, 1957, upheld said Contracting Officer's denial on the grounds that added costs of work arising from the necessity of completing inadequate design, plans, specifications or drawings were not "changes" within the meaning of Article III of said contract.

Plaintiff is entitled to recover from defendant all costs resulting from defendant's failure to furnish adequate and complete plans and specifications, as well as its failure to disclose all facts within its knowledge, namely, direct costs of extra work in the amount of \$4,457.24 and a fair and reasonable apportionment of (a) added winter protection costs of \$183,431.46, (b) added administrative, overhead and equipment costs of \$216,717.63, (c) added labor costs of \$79,844.18, and (d) added excessive inspection costs of \$55,000.00 attributable to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

(d) *Shield Windows*—Pursuant to a letter of intent issued by defendant to plaintiff in June, 1953, and Modifications No. 2 and No. 4 of Exhibit "A" hereto, plaintiff negotiated a contract with Corning Glass Works, under the general direction of defendant, for the procurement of shield windows, which were originally to be furnished

plaintiff by defendant for installation in the structure designated in said contract as Building No. 607. As the [fol. 12] result of defendant's insistence, the following language was inserted in plaintiff's contract with Corning Glass Works:

(1) "All glass supplied will conform to the required specifications as tested and approved by the Argonne National Laboratory."

(2) "It is understood and agreed that all components and assemblies of the shield windows are subject to the inspection of authorized Government representatives in manufacturer's plant and at site."

(3) "The Corning Glass Works shall submit shop drawings and samples . . . as required in sufficient time to allow for processing and final approval to preclude the possibility of delaying job progress."

Although the contract with Corning Glass Works was finally negotiated by plaintiff on August 5, 1953, defendant did not finally approve all shop drawings until March 2, 1954—seventeen (17) days before the March 19, 1954 contract expiration date. The time consumed by defendant in approving shop drawings after submittal, with respect to the various types of required shield windows, was: Type I—129 days; Type II—138 days; Type III—112 days; Type IV—94 days; Type V—84 days.

On or about February 18, 1954, a representative of Argonne National Laboratory, together with a representative of the Architect-Engineer, each of whom were tutored authorities and practical experts on shield glass windows, approved all Type II windows. Thereafter, defendant made no effort to inspect glass at the source, although it was advised by plaintiff and Corning Glass Works of glass manufacturing progress. On or about June 14, 1954, [fol. 13] after all shields of glass had been delivered to the site, other representatives of defendant, who lacked academic or practical experience in the manufacture, use, or installation of shield glass, overruled the above expert representatives and rejected all Type II windows. The rejected glass was returned to Corning Glass Works on or about July 9, 1954.

Corning Glass Works maintained that the glass in question was within the tolerances established by defendant's plans and specifications and appealed to the Director of Reactor Branch, United States Atomic Energy Commission for competent unbiased inspection. Such an inspection was conducted and, on or about February 1, 1955, defendant reversed its decision and plaintiff was allowed to proceed with its work after a further delay of 35 days.

On or about August 12, 1954, defendant discovered that the mineral oils in one of the installed Type I windows had acquired a cloudy haziness. On or about August 16, 1954, Corning Glass Works advised defendant, by letter, that such cloudy condition had been encountered in other locations and that it had been determined that the condition could be eliminated by de-colorizing the oil. Despite this information defendant, on or about September 2, 1954, rejected Type I windows, without inspection or testing, on the ground that moisture in the windows was causing the cloudiness. Defendant made no effort to test the oil and determine whether actualities or prejudice was the basis of its rejection until October 15, 1954, or 43 days after the September 2, 1954 rejection. It was not until October 26, 1954, or 105 days after the cloudy oil was first [fol. 14] noted, that defendant's representatives verbally notified plaintiff that defendant's rejection was erroneous and that the cloudy oil was not plaintiff's responsibility. Installation of Type I windows was completed five days later.

Plaintiff presented a claim, under Article IV of said contract, to defendant's Contracting Officer for the extra work and costs of delay resulting from defendant's erroneous, arbitrary, unreasonable and excessive inspection and rejection, which was denied by said Contracting Officer on or about June 26, 1954. On or about June 26, 1954, plaintiff appealed to the Atomic Energy Commission's Advisory Board on Contract Appeals and the Board, in Docket No. 76, by Findings of Fact and Recommendation dated July 23, 1957, found that plaintiff could not exercise much, if any, discretion with respect to the procurement of materials for the windows; that plaintiff, in assuming defendant's initial responsibilities under said contract at

defendant's request, received no assistance from defendant in the difficulties encountered with shield windows; that the "*modus operandi* on changes and shop drawings was not calculated to assure a maximum expedition;" that plaintiff performed to the best of its ability; that plaintiff was "subjected to delays that were not of its making." Said Board allowed an extension of time under said contract to November 2, 1954, plus such additional time necessary to complete operations dependent upon window installation, but denied plaintiff's claim for increased costs.

In addition to said extension of time, plaintiff is entitled to a fair and reasonable apportionment of the (a) added [fol. 15] winter protection costs of \$183,431.46, (b) added administrative, overhead and equipment costs of \$216,717.63, (c) added labor costs of \$79,844.18 and (d) added excessive inspection costs of \$55,000.00 attributable to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

(c) *Amercoat Paint*—In March of 1954, plaintiff discovered that government furnished materials for the "hot shop", namely, top and bottom guide rails, four travelling boom systems and miscellaneous items of machinery, were of (1) questionable quality and (2) rust and mill scale had not been removed before a factory coat of paint had been applied, and (3) improper crating caused considerable transit damage.

Defendant directed plaintiff to perform the necessary removal of rust and mill scale and to paint all government furnished materials or equipment, including shield doors, in the "hot shop" with "Amercoat". Plaintiff proceeded with such work, under protest, maintaining that defendant's painting specifications made no mention of "Amercoat" paint being required on anything but the walls of the "hot shop". Plaintiff suspended and postponed the pouring of concrete in the "hot shop" until May, 1954, dismantled assembled shield doors, sand-blasted all surfaces and applied the "Amercoat" paint as requested by defendant.

Defendant advised plaintiff in June, 1954 that shield doors were "movable walls", and hence within the paint-

ing specifications prepared by defendant. On or about [fol. 16] December 6, 1954, after eight months of delay, successor representatives of defendant reversed the earlier decision of April, 1954, and agreed to a settlement formula with respect to the added direct costs of the additional required painting.

Plaintiff, in addition to such added direct costs, is entitled to recover a fair and reasonable apportionment of the total increase in (a) winter protection costs of \$183,431.46, (b) added administrative, overhead and equipment costs of \$216,717.63, (c) added labor costs of \$79,844.18, and (d) added excessive inspection costs of \$55,000.00 attributed to such delay and failure to perform. Plaintiff will ask leave of court to amend this petition when the precise amount of such apportionment has been determined.

8. Plaintiff estimates that ninety per cent (90%) of the aggregate of said additional costs referred to in paragraphs 6 and 7 hereof were due to defendant's delays and failures to perform in accordance with said contract, representations and implied and express warranties, on the phrases of said project specified in sub-paragraphs 7(a), (b), (c), (d) and (e); therefore, plaintiff incorporates herein by reference said sub-paragraphs as the major, aggregated, serious, independent and specific failures by defendant to perform in accordance with said contract, representations, and implied and express warranties.

9. Subsequent to the award by defendant on March 19, 1953, of said contract, Exhibit "A" hereto, and thereafter, during the entire course of plaintiff's work, including, but [fol. 17] not limited to, the above five phases of said project (sub-paragraphs 7(a), (b), (c), (d) and (e) herein), and continuing until the work was completed and accepted on January 7, 1955, defendant failed to make necessary corrections relating to design and general arrangement, or to pass upon shop drawings with reasonable promptness in accordance with said contract.

On or about April 15, 1953, defendant's Architect-Engineer directed plaintiff to forward shop drawings for approval to Los Angeles, California. Plaintiff objected

to such procedure on the grounds that the specifications called for inspection by the defendant, presumably at the job-site, and that such procedures would cause delay. On or about April 27, 1953, defendant modified the Architect-Engineer's above direction and instructed plaintiff to submit shop drawings to the Architect-Engineer at Idaho Falls, Idaho. This modified procedure compounded the delays anticipated earlier by plaintiff since the Architect-Engineer submitted such shop-drawings to its office in Los Angeles, California, in spite of defendant's modification of April 27, 1953, and added a transmittal link in the procedure for the submission and approval of shop-drawings. During the entire course of plaintiff's work there was a five to seven week elapse of time between shop-drawing submittal by plaintiff and approval by defendant resulting in a four-month over-all delay on the project. Defendant's failure to promptly pass upon shop-drawings was due partly to its lack of supervision and qualified personnel at the job-site, necessitating transmittal of such drawings to the Architect-Engineer's main office in Los [fol. 18] Angeles, California, and in large part, to inadequate specifications for which a desired end-result, if any, could not be obtained by alteration of such drawings without making in effect, major and material changes, alterations and additions to such plans and specifications by unreasonably, arbitrarily and excessively imposing on plaintiff added design responsibility and extra work.

Defendant well knew at the time that it awarded said contract to plaintiff that its end-result, as represented in said contract, was not the end-result it would ultimately desire; and, further, defendant well knew that the statement of work and plans and specifications for this entire project were not, as represented, adequate for producing the end-result represented in said contract, or any end-result which defendant desired.

As a result of defendant's failure to formulate a desired end-result prior to the award to plaintiff of said contract, and, as a result of defendant's failure to prepare adequate plans and specifications for the construction and completion of the end-result represented in said contract, or any end-result, and as a result of defendant's attempt to formulate and carry out the actual end-result during

the course of plaintiff's work by imposing additional design and extra work through shop-drawing procedures, said contract became, in effect, a nullity, and plaintiff was obliged to incur actual costs of \$6,415,858.75 for the completion of said contract, or \$1,100,965.23 in excess of the contract price of \$5,314,893.52.

10. No one other than the plaintiff is the owner of the claims herein and no assignment or transfer of the same [fol. 19] has been made. No other action has been had on said claim in Congress, or by any of the departments except as herein alleged, and plaintiff is justly entitled to the amounts herein claimed from the United States, after allowing all just credits and set offs.

WHEREFORE, plaintiffs prays (1) that said contract be rescinded and declared null and void, and demands judgment for its actual costs of performance on said project in the amount of \$6,415,858.73 plus a reasonable profit of six per cent (6%) or a total of \$6,800,809.73, less the actual amount paid under said contract, \$5,314,893.52, or a total sum due of \$1,485,916.21; or, alternatively, plaintiff demands judgment in the amount of \$666,541.15 for defendant's delays on said project; or, alternatively, plaintiff demands judgment for ninety per cent (90%) of said defendant's delays occurring on the herein described major phases of said contract, namely, the sum of \$590,893.02.

/s/ Gardiner Johnson
111 Sutter Street,
San Francisco 4, California
Attorney for Plaintiff.

THOMAS E. STANTON, JR.,
CHARLES J. HEYLER,
Of Counsel.

[fol. 20]

EXHIBIT A TO PETITION (EXCERPTS)

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 19th day of March, 1953, by THE UNITED STATES OF AMERICA, hereinafter called the Government, represented by the contracting officer executing this contract, and UTAH CONSTRUCTION COMPANY, a corporation organized and existing under the laws of the State of Utah, of the city of Salt Lake City in the State of Utah, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

. . . .

[fol. 21]

. . . .

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at

the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

[fol. 22]

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor

and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer, shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

[fol. 23]

ARTICLES 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. *Payments to contractors*.—* * *

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

* * * *

[fol. 24]

11/17/52

SPECIFICATIONS FOR CONSTRUCTION CONTRACT GENERAL CONDITIONS

* * * *

[fol. 25]

* * * *

GC-25 **SUSPENSION OF WORK.** The Commission may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Commission to be necessary or desirable for the convenience of the Government. If such suspension delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault or negligence of the Contractor, the Commission shall make an equitable adjustment in the contract price and time of performance and modify the contract accordingly; *Provided*, however, that no adjustment will be made under this article for suspensions ordered under any other article of the contract or provision of the specifications; and *provided further*, that any claim for adjustment hereunder must be asserted within 30 days from the date such suspension is ordered. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in the article of this contract entitled "Disputes".

* * * *

[fol. 26]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

[Title Omitted]

DEFENDANT'S ANSWER—Filed November 1, 1961

As and for its answer herein defendant alleges as follows:

1. Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the petition, and defendant therefore denies them.

2. Defendant admits the allegations contained in paragraph 2 of the petition except the defendant refers to all the contract documents and drawings for an ascertainment of their contents.

3. Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the petition, and defendant therefore denies them.

4. Answering paragraph 4 of the petition defendant admits that plaintiff received a notice to proceed dated March 19, 1953. Defendant denies the remaining allegations contained in paragraph 4 of the petition.

[fol. 27] 5. Answering paragraph 5 of the petition defendant admits that the work under the contract was completed on or about January 7, 1955, and that the work was completed within the contract time as extended. Defendant further alleges that plaintiff has already been paid by the defendant all that it was entitled to receive as a result of the performance of the contract. Defendant denies the remaining allegations contained in paragraph 5 of the petition.

6. Defendant denies the allegations contained in paragraph 6 of the petition.

Defendant further alleges that any claims based on extra work are irrelevant, immaterial and outside the scope of plaintiff's claim filed herein for breach of contract. (See

page 5, items numbers 7 and 8 in plaintiff's objection to defendant's motion for more definite statement filed herein September 27, 1961.)

7. Defendant denies the allegations contained in the first sentence of paragraph 7 of the petition.

7(a) Defendant admits the allegations contained in the first sentence of subparagraph (a) of paragraph 7 of the petition. Defendant denies the remaining allegations contained in the first paragraph of subparagraph (a) of paragraph 7. Defendant further alleges that plaintiff never made any claim for "float rock" during the time of the performance of the contract.

Defendant admits the allegations contained in the second paragraph of subparagraph (a) of paragraph 7 of the petition.

[fol. 28] Answering the third paragraph of subparagraph (a) which begins "On or about April 27," defendant admits that plaintiff took an appeal to the Atomic Energy Commission's Advisory Board on Contract Appeals and that that Board in Docket No. 87 heard the appeal, and rendered a decision. Defendant refers to this decision of that Board for a complete statement of the decision of the Board. Defendant further alleges that there is no allegation contained in the petition that this decision was arbitrary, capricious, or not supported by substantial evidence.

Defendant further alleges that any discussion based on "changed conditions" is irrelevant, immaterial and outside the scope of this cause of action for a breach of contract. (See page 5, items numbers 7 and 8 in plaintiff's objection to defendant's motion for more definite statement filed herein September 27, 1961.)

Defendant denies the allegations contained in paragraph 4 of subparagraph (a) of paragraph 7 of the petition which begins "Defendant well knew, or should have known,". Defendant incorporates by reference herein its allegations made in paragraph 6 of this answer concerning the irrelevance and immateriality of claims based on extra work under plaintiff's breach of contract theory. Defendant further specifically denies that plaintiff is entitled to receive any sum from the defendant.

7(b) Defendant admits the allegations contained in the first sentence of paragraph 7(b) of the petition which begins "It was contemplated". Defendant admits that the concrete mixture being used was deficient in the [fol. 29] strength requirements as specified by the contract. Defendant denies the remaining allegations contained in the first paragraph of paragraph 7(b) of the petition.

Answering the second paragraph of 7(b) of the petition defendant admits that there were fines in the concrete aggregate furnished by the defendant to the plaintiff. Defendant denies that the fines in the concrete aggregate caused the deficient strength. Defendant admits that it had the fines removed from some of the concrete aggregate. Defendant further admits that it authorized the plaintiff at defendant's cost to increase the concrete mixture by one bag of cement to six instead of the originally specified five bags of cement per cubic yard. Defendant admits that the added bag of cement provided additional strength and denies that this increased the plaintiff's finishing costs. Defendant further alleges that the plaintiff was fully paid in March 1954, for the extra cement plus an allowance for supervision, general expense and profit.

Answering the third paragraph of 7(b) of the petition which begins "On or about July 19, 1956," defendant admits that plaintiff presented this claim to the Contracting Officer long after all of the work under the subject contract was completed.

Answering paragraph 4 of paragraph 7(b) of the petition which begins "Said Contracting Officer" defendant admits that the Contracting Officer denied the claim and further admits that the plaintiff took an appeal (Docket No. CA-121) to the Contract Appeals Board and that the decision rendered on that appeal denied the plaintiff's [fol. 30] claim. Defendant refers to the Contracting Officer's decision and to the decision of the Hearing Examiner for a complete statement of these decisions.

Defendant further alleges that there is no allegation contained in the petition that this decision by the Hearing Examiner was arbitrary, capricious or not supported by

substantial evidence. Defendant further alleges that plaintiff did not petition the Atomic Energy Commission for a review of the Hearing Examiner's decision even though it had a right to petition for this review under the terms of the applicable regulations for administrative remedies. Defendant further alleges that under these same regulations in the absence of such a petition for review, the decision of the Hearing Examiner became the final action of the Commission sixty days after it was rendered.

Defendant denies the allegations contained in paragraph 5 of subparagraph 7(b) which begins "Due to the delays". Defendant further incorporates herein by reference its allegations contained in paragraphs 6 and 7 of this answer at pages above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract.

7(c) Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 7(c) of the petition and defendant therefore denies them. Defendant denies the remaining allegations contained in the said paragraph.

Defendant denies the allegations contained in the second paragraph of subparagraph 7(c) of the petition. [fol. 31] Answering the third paragraph of subparagraph 7(c) of the petition which begins "On or about October 29, 1955," defendant admits that plaintiff's claim was denied by the Contracting Officer, and that the Atomic Energy Commission's Advisory Board on Contract Appeals in a decision dated April 25, 1957 (Docket No. 95) upheld the Contracting Officer's denial. The defendant refers to the Contracting Officer's decision and to the Board decision for a complete statement of these decisions.

Defendant further alleges that there is no allegation contained in the petition that the decision of the Board was arbitrary, capricious or not supported by substantial evidence.

Defendant denies the allegations contained in paragraph 4 of subparagraph 7(c) of the petition which begins

"Plaintiff is entitled" and specifically denies that plaintiff is entitled to recover any sum from the defendant. Defendant incorporates herein by reference its allegations contained in paragraphs 6 and 7 at pages above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under the plaintiff's theory of breach of contract.

7(d) Defendant admits the allegations contained in the first sentence of paragraph 7(d) of the petition. Further answering the said subparagraph, defendant admits that the quoted language from the plaintiff's contract with Corning Glass Works which is set out at the top of page 12 of the petition appears in that contract. Defendant [fol. 32] denies that the language appears in the contract as a result of defendant's insistence. Defendant refers to the plaintiff's entire contract with Corning Glass Works for a complete statement of its terms and conditions.

Defendant denies the allegations contained in the second paragraph of subparagraph 7(d). Defendant further alleges that substantially all of the diagrams, specifications and shop drawings for the windows had been approved on a date prior to December 30, 1953 when the plaintiff finally entered into the negotiated price agreement with the defendant for the installation of the shield windows. Accordingly, any costs for delays on account of approval of the shop drawings which occurred prior to the time the plaintiff entered into this negotiated agreement were, or should have been, included in the price which the plaintiff charged the defendant under the terms of the negotiated agreement.

Defendant denies the allegations contained in the third paragraph of subparagraph 7(d) of the petition which begins "On or about February 18, 1954".

Defendant denies the allegations contained in paragraph 4 of subparagraph 7(d) of the petition, and defendant further alleges that the work under this contract was completed on or about January 7, 1955 as plaintiff alleges in paragraph 5 of the petition.

Answering the first sentence of paragraph 5 of subparagraph 7(d) defendant alleges that defendant and

representatives of the plaintiff discovered the cloudy haziness in one of the shield windows. Answering the [fol. 33] second sentence of the said paragraph defendant admits that it received a letter concerning this condition from the Corning Glass Works and refers to that letter for a statement of its contents. Defendant denies the third sentence of the said paragraph and specifically denies that it rejected the windows. Defendant alleges that its representative advised the plaintiff that it would be proceeding with the installation of the windows at its own risk if it installed them prior to the time that the matter of the haze condition was cleared up. Defendant denies the allegations contained in the fourth sentence of the said paragraph. Defendant denies the allegations contained in the fifth sentence of the said paragraph and specifically denies that any delay in the installation of the windows held up any of the other contract work which remained to be done. Answering the last sentence of the said paragraph defendant admits that practically all of the work of the installation of the Type I shield windows had been completed prior to the time that the hazy condition was discovered and that this work was entirely completed shortly after plaintiff recommenced it.

Answering paragraph 6 of subparagraph 7(d) defendant admits that the plaintiff presented a claim to the Contracting Officer and that after the denial of this claim the plaintiff appealed to the Atomic Energy Commission's Advisory Board on Contract Appeals. Defendant further admits that in Docket No. 76 the Board decided that the plaintiff was entitled to an extension of time but was not entitled to any extra compensation. Defendant refers to [fol. 34] the decisions of the Contracting Officer and the Board for a complete statement of these decisions.

Defendant further alleges that there is nothing in the plaintiff's petition which alleges that the said decision of the Board was arbitrary, capricious or not supported by substantial evidence.

Defendant denies the allegations contained in the last paragraph of subparagraph 7(d) which begins "In addition to said extension of time" and specifically denies that plaintiff is entitled to receive any sum from the de-

defendant. Defendant incorporates herein by reference its statements in paragraphs 6 and 7 at pages above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract.

7(e)¹ Defendant denies all of the allegations contained in all of the paragraphs of the petition beginning with numbered paragraph 7(e) and continuing down to paragraph 8.

In clarification of these items of claim the defendant deems it necessary to make the following allegations: There were 3 claims by the plaintiff concerned with Amercoat Paint under this contract. One of these claims was the subject of item 4 of Contract Modification 20 in which the plaintiff was fully paid for its work. A second claim was the subject of item 7 of Modification 20 of the con-[fol. 35] tract in which plaintiff was again fully compensated for that work. The third claim was on account of the withholding of funds from the plaintiff by the defendant because certain of the plaintiff's Amercoat Paint work cracked and peeled and had to be redone by another contractor at defendant's expense. This third claim was the subject of a reservation in the release which was executed by the plaintiff and which is discussed in defendant's affirmative defense number I at page below. This third claim was later also paid by the defendant. Accordingly, all of the plaintiff's claims for Amercoat Paint have been fully paid and settled, and the only one which was the subject of a reservation in the release was paid by the defendant after the release was executed.

Defendant incorporates herein by reference its allegations contained in paragraphs 6 and 7 above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract, and defendant specifically denies that plaintiff is entitled to recover any sum from the defendant.

8. Defendant denies the allegations contained in paragraph 8 of the petition.

¹ This paragraph is again marked in the petition (c) but probably should be (e).

9. Defendant denies the allegations contained in the first paragraph of numbered paragraph 9 of the petition.

Answering the second paragraph in numbered paragraph 9 defendant admits that in order to save time defendant's Architect-Engineer directed plaintiff to forward shop drawings for approval to its office at Los Angeles, [fol. 36] California. Answering the second sentence of the said paragraph defendant admits that the plaintiff objected to this procedure on the ground, among others, that under this arrangement it would have to pay the air mail postage for the forwarding of the drawings. Defendant refers to that letter for a full statement of its contents. Defendant admits the allegations contained in the third sentence of the said paragraph which ends with the phrase "at Idaho Falls, Idaho". Defendant further alleges that in certain instances approval of shop drawings was waived in order to expedite the work. Defendant denies all of the remaining allegations contained in all of the remaining paragraphs of paragraph 9.

Defendant incorporates herein by reference its allegations contained in paragraphs 6 and 7 above concerning the irrelevance and immateriality of claims based on extra work and changed conditions under plaintiff's theory of breach of contract.

10. Defendant denies the allegations contained in the first sentence of paragraph 10 of the petition. Defendant's attorney does not have knowledge or information sufficient to form a belief as to the truth of the allegations contained in the remainder of paragraph 10 of the petition, and defendant therefore denies them. Defendant further specifically denies that the plaintiff is due any sum from the defendant.

11. Defendant denies each and every allegation contained in the petition including those in the Wherefore Clause which are not specifically admitted or qualified herein.

[fol. 37]

AFFIRMATIVE DEFENSES

I. Release

12. In a release dated March 22, 1957, plaintiff herein released the Government from all claims arising under, in

connection with or by virtue of the subject contract and all modifications thereto with the exception of the shield window claim, the pier drilling claim, the shield door claim, the concrete aggregate claim, and the sum of \$5,606.39 which was withheld pending a decision in the Amercoat appeal.

Subsequent to the execution of this release, defendant paid the plaintiff the sum of \$5,606.39 in settlement of the Amercoat Paint appeal. Accordingly, all claims under this contract except those for shield windows, pier drilling, shield doors and concrete aggregate are forever released. Consequently, in so far as any claims in plaintiff's petition relate to or arise in connection with any matters except the shield windows, pier drilling, shield doors, and concrete aggregate, these claims are barred by the said release.

II. Payments

13(a) Concrete Aggregate And Related Claims (Pet. 7(b))

By letters dated July 23 and July 31, 1953 plaintiff requested that defendant furnish it with clean aggregate and compensate it for the extra bag of cement which it had begun putting in the concrete mix at defendant's direction. By letter dated February 9, 1954, plaintiff, referring to the direction to it to use an extra bag of [fol. 38] cement, and to its own letter of July 23 requesting reimbursement, submitted a statement in the amount of \$8,640 which included provisions for the cost of the cement, and for supervision, general expense, and profit.

Defendant caused the aggregate to be cleaned, and on March 20, 1954 paid plaintiff according to the account which it had stated. This fulfillment by the defendant of all of plaintiff's requests as they were expressed in the two letters of July 23 and 31, and the statement of account of February 9, including extra payment for general expense constitutes a complete settlement of all phases of this claim.

(b) Amercoat Paint

By agreement of the parties in Contract Modification 20, items 4 and 7, plaintiff was fully compensated for all of its claims based on Amercoat painting, cleaning, etc. except for the claim which it reserved in the release. Subsequent to the execution of the release, defendant also paid that claim which had been reserved. Accordingly, all of plaintiff's claims based upon or arising in connection with Amercoat Paint have been fully paid and satisfied.

III. Estoppel

14(a) Concrete Aggregate And Amercoat Paint

Defendant incorporates by reference here its allegations contained in paragraphs 13(a) and (b) immediately above. After statement of account or price negotiations followed by payment, and the lapse of a considerable period of time, plaintiff is estopped from adding to the set-[fol. 39] tled claims other alleged costs which are allegedly based upon these settled claims.

(b) Shield Window Claim

Defendant incorporates here by reference its allegations in paragraph 7(d) above concerning the fact that at the time plaintiff entered into the negotiated price agreement with defendant for installation of the shield windows substantially all of the shop drawings had already been approved. Having entered into this negotiated price agreement, plaintiff is estopped from now asserting delay costs based on delivery of shop drawings which occurred prior to the execution of the price agreement.

IV. Failure To Exhaust Administrative Remedies

15(a) Finishing And Other Costs Based On The Aggregate Claim

More than one year after the work under the subject contract was completed, plaintiff presented a claim concerning these alleged finishing and other costs based on the aggregate claim to the Contracting Officer. The Contracting Officer denied the claim. Subsequently the Atomic Energy Hearing Examiner held in Docket No. CA-121 that this late claim by plaintiff was untimely under the

terms of the contract. The Atomic Energy Commission's rules of procedure provided for review of the Hearing Examiner's decision by the Atomic Energy Commission. However, plaintiff did not petition for this review. Accordingly, plaintiff failed to exhaust its administrative remedies, and this claim (Pet. 7(b) *et seq.*) is barred in this Court.

[fol. 40] (b) Pier Drilling (Docket No. 87)

On February 18, 1955, approximately a month after completion of the entire contract, plaintiff first presented a claim for "float rock" in connection with pier drilling for the foundation. Defendant alleges that this was an untimely presentation of a claim which arose, if it arose at all, at the very beginning of the contract in the Spring of 1953.

Still later plaintiff presented a larger claim for additional compensation and an extension of time in connection with the pier drilling claim. Defendant alleges that this claim was likewise untimely. After this larger claim was denied by the defendant's Contracting Officer, plaintiff appealed this denial to the Atomic Energy's Advisory Board on Contract Appeals. In Docket No. 87 the Board held among other things that no additional cost to plaintiff resulted from such changed condition except in so far as plaintiff was liable over to its drilling subcontractor. The Board recommended that this matter be remanded to the Contracting Officer for a determination whether or not plaintiff was thus actually liable to its subcontractor.

After the matter was remanded to the Contracting Officer, that officer wrote plaintiff in a letter dated July 25, 1958 to ascertain whether plaintiff intended to attempt to prove actual damages of its own. Plaintiff never requested an opportunity to submit such proof. Accordingly, plaintiff failed to exhaust its administrative remedies in connection with the pier drilling claim (Pet. 7(a) *et seq.*).

[fol. 41] (c) Amercoat Paint

Plaintiff never took an administrative appeal in connection with the two items of its Amercoat Paint claim which were settled by items 4 and 7 of Modification 20.

Accordingly, all claims based on these items are barred by plaintiff's failure to exhaust its administrative remedies as well as by plaintiff's acceptance of payment in settlement of these items.

(d) Dockets Numbers 76 and 95

These claims concerning shield windows and shield doors were also remanded to the Contracting Officer for a determination of whether plaintiff was entitled to further extensions of time. Plaintiff was requested by letter dated July 25, 1958 to notify the Contracting Officer if it wished to proceed further in these matters. Plaintiff having received extensions of time by contract modification did not make such a request and accordingly it failed to exhaust its administrative remedies in this regard. Therefore any matters which were encompassed in these appeals that appear in plaintiff's petition are barred by its failure to exhaust administrative remedies.

(e) Other Administrative Appeals

In addition to the administrative appeals which are discussed above, plaintiff herein began the processing of two other appeals. These were Dockets Nos. 91 and 96 concerning extensions of time, and a claim in connection with generators.

The Atomic Energy Commission Advisory Board remanded these matters back to the Contracting Officer for [fol. 42] further proceedings. The petition contains no allegations that these decisions were arbitrary capricious or not supported by substantial evidence. After the remand, plaintiff abandoned the generator claim and never requested further proceedings regarding the time extensions because it received sufficient extension by negotiation. Accordingly, in so far as any matters contained in the present petition are encompassed by these appeals which plaintiff allowed to die such matters are barred in this Court by plaintiff's failure to exhaust available administrative remedies.

V. Laches

16. (a) On February 18, 1955, more than a month after the work under the subject contract was completed,

plaintiff for the first time presented a claim on account of "float rock" which it alleged was encountered by its drilling subcontractor when it was drilling the holes for the foundation piers. According to the petition this condition was discovered on or about June 1, 1953. However, plaintiff waited until all of the holes were filled with concrete and indeed until after all of the contract work was completed before it presented this claim thereby preventing the defendant from investigating the matter and from mitigating damages, if there were any. Plaintiff's failure to promptly notify the Contracting Officer of this situation violated the terms of the contract and damaged the defendant. Accordingly, this claim should be barred by laches.

(b) Concrete Aggregate

On March 20, 1954, defendant paid plaintiff according [fol. 43] to its statement of account for extra cement and for supervision, general expense and profit in connection therewith.

On July 19, 1956, more than a year after the completion of the contract, plaintiff presented an additional claim based on the aggregate claim in the sum of \$109,356. Plaintiff's failure to promptly notify the Contracting Officer of this new claim based on an already settled claim prevented the defendant from promptly investigating the alleged situation and prevented the mitigation of damages, if there were any. Accordingly, this claim should be barred by laches.

(c) Shield Doors

Plaintiff did not present this claim until after the completion of the contract and accordingly defendant was prevented from promptly investigating the situation and from mitigating the damages, if there were any. Accordingly, this claim should be barred by laches.

(d) Shield Windows

(1) Claim For Delay In The Delivery Of Shop Drawings Which Occurred Prior To The Execution Of The Negotiated Price Agreement. On December 30, 1953 plain-

tiff and defendant entered into a negotiated price agreement for the installation by plaintiff of the shield windows. Defendant had a right to rely upon the fact that the price which was fixed in this agreement took into account any prior damages and delays which the plaintiff might have suffered in connection with the shield windows. However, plaintiff later presented a claim based in part upon alleged delays which occurred prior to the execution [fol. 44] of the price agreement. This late presentation of this portion of the claim damaged the defendant and prevented its making a prompt investigation of the situation and mitigating damages, if there were any. Accordingly, this claim should be barred by laches.

(2) Presentation Of A More Limited Claim Than The One Which Is Presented Here. Even when the contractor first presented this claim to the Contracting Officer (on June 23 and 24, 1954) it only alleged three conditions which were: lateral movement and distortion of the Koroseal gaskets under compression, specifications which were too indefinite, and use of a selective assembly procedure in the assembly of the shield windows.

It was only later, during November 1955, at the Board Hearing that plaintiff raised numerous other issues such as revisions made under the contract, delays in submitting drawings, etc. This delay in the presentation of these various claims and issues by the plaintiff prevented the defendant from promptly investigating the situation and mitigating damages, if there were any. Accordingly, this entire claim concerning shield windows should be barred by laches.

(e) Amercoat Paint Claims

By payment of these various claims as alleged in paragraph 13(b) above, defendant had a right to believe that these claims were settled. Plaintiff by raising matters based upon these claims at this late date has obviously prevented the defendant from promptly investigating the situation and mitigating damages, if any, which occurred in connection with these new matters based upon the old claims. Accordingly, these claims should be barred by laches.

[fol. 45] (f) Delay In The Presentation Of The Entire Claim

The work under this contract was completed on January 7, 1955. However, plaintiff waited 5 years and 364 days until January 6, 1961 before filing its petition in this Court. This further delay in addition to those recited in the foregoing paragraphs compounds defendant's damage. For defendant will obviously encounter considerably more difficulty and will have to incur considerably more expense in defending this action than would have been necessary had the petition been filed promptly, or even within a reasonable time after completion of the contract. This is particularly true in a construction case such as this where most of the contract workers scatter to other locations soon after the completion of the job. Five years and 364 days later they are considerably more difficult to locate, and their memories are less vivid than would have been true had the petition been filed promptly. Accordingly, this entire claim should be barred by laches.

VI. Equitable Estoppel

17. Defendant incorporates here by reference all of paragraph 16 and all of its subparagraphs immediately above except the last sentence in the paragraph and in each subparagraph. Defendant substitutes the following sentence in place of the last sentence in each instance. "Accordingly, this claim should be barred by equitable estoppel."

[fol. 46] WHEREFORE, defendant prays that plaintiff's petition be dismissed.

/s/ William H. Orrick, Jr.
Assistant Attorney General
Civil Division

/s/ Melford O. Cleveland
Attorney, Civil Division
Department of Justice

[fol. 47] [File Endorsement Omitted]

[fol. 48]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

[Title Omitted]

DEFENDANT'S AMENDED ANSWER—Filed November 30,
1961

Pursuant to Rule 18(a) of the Rules of this Court defendant amends its answer as follows:

2. Paragraph 2 of defendant's answer is deleted and the following paragraph is substituted therefor:

2. Defendant admits the allegations contained in paragraph 2 of the petition with the exception of the phrase "except as hereinafter alleged". Defendant denies the allegations contained in this phrase. Defendant refers to all the contract documents and drawings for an ascertainment of their contents.

7(b) Defendant substitutes the following sentence in place of the second sentence in subparagraph 7(b) of its answer:

Defendant admits that some of the concrete mixture being used was deficient in the strength requirements as specified by the contract.

Defendant substitutes the following sentence in place of the third sentence in the second paragraph of subparagraph 7(b) of its answer:

Defendant admits that it had fines removed from some of the concrete aggregate.

[fol. 49] 7(c) Defendant substitutes the following sentence in place of the first sentence in the third paragraph of subparagraph 7(c) of the petition:

Answering the third paragraph of subparagraph 7(c) of the petition which begins "On or about Oc-

tober 29, 1955," defendant admits that plaintiff's claim which was in the sum of \$4,457.25 for eleven items of allegedly extra work, was denied by the Contracting Officer with the exception of two items totaling \$53.00 which were allowed; and that the Atomic Energy Commission's Advisory Board on Contract Appeals in a decision dated April 25, 1957 (Docket No. 95) upheld the Contracting Officer's decision.

7(d) Defendant substitutes the following sentence in place of the first sentence in subparagraph 7(d) of its answer:

Defendant admits the allegations contained in the first sentence of subparagraph 7(d) of the petition except that defendant denies that the contract was negotiated under the general direction of defendant.

9. Defendant substitutes the following sentence in place of the third sentence in the second paragraph in numbered paragraph 9 of the answer:

Defendant refers to this letter of plaintiff's dated April 21, 1953, for a full statement of its contents.

13. (a) Defendant inserts the following paragraph as paragraph 13(a) of the answer:

13. (a) Pier Drilling Claim (Petition 7(a) *et seq.*)

It was originally anticipated that the contractor would drill the pier holes two feet into solid lava bedrock and that this bedrock would probably be encountered below elevation 4747'. The contractor, through a subcontractor, proceeded with the pier drilling until June 1, 1953 when it notified the AEC that it had encountered a changed subsurface condition and was ceasing operations.

[fol. 50] After investigation the AEC determined that in 47 cases out of the 111 pier holes on which drilling had been commenced, lava bedrock was encountered above elevation 4747'. The contractor was thereafter permitted to drill each pier hole two feet into solid lava bedrock and stop whether this bed-

rock was encountered above or below elevation 4747'; and was paid for this two feet at the rate provided for solid lava rock excavation. (The subject of "float rock" was never mentioned at that time.)

Plaintiff accepted this adjustment together with the payments made in accordance with its terms, and recommended and finished the pier drilling without protest. This payment made under these circumstances which was accepted by plaintiff without protest constitutes a complete settlement of all phases of the pier drilling claim.

(b) Defendant changes numbered paragraph 13(a) in the original answer to numbered paragraph 13(b) in the amended answer.

(c) Defendant changes numbered paragraph 13(b) in the original answer to numbered paragraph 13(c) in the amended answer.

14. (a) Defendant substitutes the following for the heading and first sentence in paragraph 14(a) of the answer:

14. (a) Pier Drilling, Concrete Aggregate, And Amercoat Paint

Defendant incorporates by reference here its allegations contained in paragraphs 13(a), (b), and (c) immediately above.

(b) Defendant substitutes the following sentence in place of the last sentence in paragraph 14(b) of the answer.

Having entered into this negotiated price agreement, plaintiff is estopped from now asserting delay costs based upon any activities in connection with the shield windows which occurred prior to the execution of the price agreement.

[fol. 51] All other language in the original answer remains as it was originally filed.

WHEREFORE, defendant prays that plaintiff's petition be dismissed.

/s/ William H. Orrick, Jr.
Assistant Attorney General
Civil Division

/s/ Melford O. Cleveland

/s/ James F. Merow
Attorney, Civil Division
Department of Justice

[fol. 52] [File Endorsement Omitted]

[fol. 53]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

[File Endorsement Omitted]

[Title Omitted]

COMMISSIONER'S ORDER AND MEMORANDUM RE APPLICABILITY OF BIANCHI DECISION—February 18, 1964

In March 1953 the plaintiff was awarded a contract to construct an assembly and maintenance area for the Atomic Energy Commission's National Reactor Testing Station in Idaho for completion a year later. The contract was completed on January 7, 1955, the time having been extended by defendant. Numerous claims were made by the plaintiff during and after contract performance. Some were settled and paid; others were the subject of adverse decisions by the contracting officer and the representative of the head of the department (in one instance a Hearing Examiner and in the other claims the AEC Advisory Board on Contract Appeals). The particular claims presented in the petition which were con-

sidered in whole or in part administratively relate to Pier Drilling, Concrete Aggregates, Shield Doors, Shield Windows, and Amercoat Paint. Another general catch-all claim sounding in breach of contract is alleged in paragraph 9 of the petition but was not claimed administratively.

[fol. 54] On March 22, 1957, the parties entered into a Receipt and Release under which, in consideration of the payment of \$52,382.92, the plaintiff released the Government from all claims "of whatever kind or character, arising under, in connection with or by virtue of" the contract, with certain enumerated exceptions covering the administrative claims for Shield Windows, Pier Drilling, Shield Door, Concrete Aggregate, and Amercoat Paint.

On June 17, 1963, the undersigned commissioner directed the parties to file briefs to enable him to decide to what extent the case is bound by the decision in *United States v. Bianchi*, 373 U.S. 703 (1963). Briefs were filed by the parties indicating the need for a separate determination as to each of the several claims contained in the petition. In order to ascertain the exact nature of the administrative determinations the commissioner borrowed from the defendant the administrative files in each of the administrative appeals, and examined carefully as to each the contractor's claims and the decisions of both the contracting officer and the AEC on appeal. As a result of such examination, and in consideration of the briefs of the parties, certain conclusions were reached as set forth in the following paragraphs:

[fol. 55]

Pier Drilling Claim

At the outset of its contract performance the plaintiff ran into float rock in drilling holes in the ground for concrete piers. On June 1, 1953, it notified the contracting officer that it had encountered subsurface conditions materially differing from those indicated in the drawings and specifications. On February 18 and March 31, 1955, the plaintiff filed its formal claims with the contracting officer, the first requesting payment of the increased

drilling costs caused by the changed subsurface conditions, and the second demanding payment of its costs resulting from the delays caused by the subsurface conditions which it alleged postponed the concrete pouring to the winter months. The contracting officer denied both claims, ruling that the rock encountered did not constitute a changed condition and that in any event did not entail the use of any extra drilling equipment which increased plaintiff's costs. The plaintiff appealed to the AEC. After a hearing, the ABCA ruled on April 30, 1957 that the float rock encountered by plaintiff constituted a changed condition and caused a delay in drilling and excavation, but did not cause delays throwing the concrete pouring into winter weather, which situation instead was caused by another dispute over the quality of concrete aggregates purchased by plaintiff from the Government. The record before the Board was not sufficient to determine (1) the increased costs of drilling caused by the changed subsurface conditions, or (2) whether plaintiff was liable to its drilling subcontractor under the terms of the subcontract or otherwise. The Board remanded these questions to the contracting officer for determination.

In its brief to the court the defendant says that, although the plaintiff conferred with the contracting officer subsequent to the remand of the claim by the Board, the plaintiff never undertook further proof of its increased drilling costs, and the contracting officer advised plaintiff that it considered the matter closed in the absence of further proof. The defendant says that plaintiff took no further action administratively, and that therefore the claim should be dismissed here for plaintiff's failure to exhaust its administrative remedies. The defendant has submitted copies of the contracting officer's correspondence with plaintiff relating to the remand, and there is no response indicated to the last letter of the contracting officer on July 25, 1958, stating that, following a conference, it was the contracting officer's understanding that plaintiff was not in a position to prove increased costs due to drilling under the Board's criteria.

The net effect of the foregoing recital of administrative proceedings is that *first*, the Board has ratified the decision of the contracting officer that the plaintiff's excavation difficulties at the outset of the contract were not responsible for the delay in pouring concrete in the winter months and the consequent winter protection expenses; and *second*, the plaintiff has failed to exhaust [fol. 57] any administrative remedy it might have with reference to the excessive drilling costs it experienced as the result of changed subsurface conditions found by the Board.

The Board had no authority to adjudicate the first element of plaintiff's claim because the relief sought was for the recovery of unliquidated damages for delays allegedly caused by the Government. The Board's sole power under the contract was to adjudicate equitable adjustment for the changed subsurface conditions, and the plaintiff's expenses providing winter protection for the freshly poured concrete could not be paid as part of an equitable adjustment because it was not expended in direct relation to the drilling either in point of time or in function. Since the Board could not adjudicate such a claim, its findings as to the cause of the delay lack the finality accorded by the disputes clause to findings of fact under the Disputes Clause, for findings made as to facts underlying a claim cognizable only in the courts are merely advisory. Therefore, in reviewing the decision on this element of the claim the court is not restricted to the administrative record but may receive and consider evidence *de novo*.

As to the remanded part of the claim, the determination of the amount of the excess drilling costs is a matter of fact under the changed conditions clause, but the determination of whether plaintiff can sue in behalf of its [fol. 58] subcontractor is a matter of law because it involves a legal interpretation of the subcontract provisions or a legal analysis of any other circumstances which might prevent the subcontractor's recovery from the plaintiff. The plaintiff had to establish both of these propositions in order to recover administratively, and no doubt the agency was ready and willing to pass

on them both if the plaintiff had prosecuted its claim to the end, even though strictly speaking the Board had no authority to adjudicate the legal issue with any finality. However, since it is obvious that the Board would have done so, it cannot be said that the plaintiff had no administrative remedy available. Whether or not the agency would entertain such an application after six years of silence by the plaintiff is not for this court to say. If the plaintiff had pursued its claim and persuaded an ultimate decision by the Board that direct drilling costs in a definite amount had been expended but that the plaintiff was not legally liable to its subcontractor and so could not maintain an action in the latter's behalf, finality would attach to the finding as to costs but not as to the liability over the subcontractor, and the latter question would then be reviewable by the court afresh on any kind of a record the parties offered. [fol. 59] In summary, the plaintiff is entitled to a trial before the court on the question of its delay damages involving the alleged postponement of its concrete pouring to the winter months as a result of its excavation difficulties, and no finality attaches to the adverse decision of the Board on this part of the plaintiff's pier drilling claim. But as to that part of the claim relating to excess costs of drilling the court's action is restricted to a determination of whether the decision below (if any) was arbitrary, capricious, or not supported by substantial evidence in the administrative record.

Concrete Aggregates Claim

The contract involved a large quantity of concrete construction. It provided that the contractor could purchase suitable aggregates from Government supplies or from other sources, but imposed no obligation on the plaintiff to purchase from the Government. The plaintiff elected to purchase aggregates from the Government. Early in the performance period (July 1953) it was discovered that the concrete initially poured was under strength, and that the dirty condition of the aggregate was at least partially responsible. Whereupon, the Government undertook to wash the aggregates to bring them

up to specification requirements. While this was being [fol. 60] done it directed the plaintiff to increase the strength of the concrete by adding one sack of cement in each cubic yard of concrete mix. This was done for several months until the condition of the aggregate improved to the point that adequate strength was obtained without using the extra sack of cement. Pursuant to plaintiff's request of July 31, 1953, for payment of the extra cement used as a changed condition, and plaintiff's later billing in February 1954 in the amount of \$8,640.93 for the cost of the extra cement including "supervision, general expense, and profit", the defendant issued Modification No. 6, part of which reimbursed the plaintiffs in the amount it had claimed for this item. The contract was completed in January 1955, and it was not until July 1956 that plaintiff filed a claim with the contracting officer for approximately \$109,000 for costs stated to have been incurred because of the poor condition of the aggregates.

The contracting officer rejected the claim on the grounds that it appeared to be one for breach of contract, not properly before him under the Disputes Article, and in the alternative that (1) the claim was untimely, and (2) the plaintiff had failed to explain the nature of the additional costs it was claiming.

[fol. 61] The plaintiff duly appealed to the AEC in January 1957 under Article 15 of the contract and requested a hearing.

In March 1957 the plaintiff executed a general receipt and release under which, for \$52,382.92, it released the defendant from all claims "arising under, in connection with or by virtue of" the contract, specifically excepting certain enumerated claims including "Concrete aggregate claim for additional compensation to Contractor".

Under newly inaugurated procedures of the AEC the plaintiff's appeal was assigned to a Hearing Examiner. In May 1959 the contracting officer filed motions to dismiss the appeal proceeding for lack of jurisdiction [i.e., breach of contract], and failure to make timely presentation of claim, and filed a third motion for a more definite statement. A hearing was held before the Hearing Ex-

aminer on the motions. Subsequently the plaintiff filed a brief in opposition to the motions.

On October 1, 1959, the Hearing Examiner filed his decision which contained findings and determinations. The plaintiff's appeal was denied and the contracting officer's motion to dismiss for plaintiff's failure to make a timely presentation of its claim was granted. No hearing on the merits was held. The plaintiff did not petition the AEC for review of the Hearing Examiner's decision as provided in the Rules of Procedure in Contract Appeals (Sec. 3.30 and 3.31).

[fol. 62] The decision of the Hearing Examiner discussed all phases of the appeal, made specific findings of fact, and dismissed the appeal on the stated ground that the claim was not timely. However, the decision also observed that, although plaintiff had based its claim under the Changed Conditions Article, the article was not applicable because the condition of the aggregates was visible on inspection and hence was not an unknown condition. Moreover, if the plaintiff's theory was on breach of warranty of fitness of the aggregates, such a claim would not be within the jurisdiction of the AEC.

It must be concluded that the *Bianchi* decision does not apply to the claim for aggregates, primarily because the decision of the Hearing Examiner of the AEC was predicated upon oral argument of counsel addressed to dispositive motions, and was not based upon a hearing on the merits affording plaintiff an opportunity (as it had requested) to prevent evidence. Further, the Hearing Examiner disposed of the appeal on the stated ground that the claim was not timely in its presentation, although neither the contract nor any cited regulations prescribe a definite time for the filing of such claims other than the requirement of the Changed Conditions Article that notice of a claim thereunder be given immediately by the contractor. Whether a claim such as the present one, sounding in unliquidated damages, filed one and one-half [fol. 63] years after completion of performance under the contract is timely is a question involving the discretionary judgment of this court, assuming that in any event the agency has jurisdiction over such a claim. The

contracting officer felt that he had no such jurisdiction because the claim was for unliquidated damages.

If the claim was for unliquidated damages for breach of warranty that the aggregates were suitable and is thus beyond the jurisdiction of the agency, then three consequences ensue to the defendant's position:

(1) No requirement existed that the claim be appealed to the AEC.

(2) The defendant's argument fails that the plaintiff has failed to exhaust its administrative remedy by failing to seek a review by the AEC of the adverse decision of the Hearing Examiner.

(3) There need be no remand to the AEC to hold a hearing on the merits.

It is not specifically mentioned by the defendant in its brief, but in comparable situations the Government has urged that factual decisions by the agency underlying legal decisions over which the agency lacks jurisdiction, nevertheless possess finality on review by this court. In view of the rulings by the court in comparable situations any argument, if made, that the Hearing Examiner's decisions as to the facts possess finality, would not be tenable.

[fol. 64] The plaintiff is entitled to a *de novo* trial on the issue of concrete aggregates, and no finality attaches to the AEC decision on this item of the claim.

Shield Windows Claim

Under the original contract the plaintiff was to install shield windows to be furnished by the defendant. Shield windows were elaborate viewing apertures to permit personnel to watch developments inside specially insulated rooms, without radioactive leakage. They involved special seals and several thicknesses of special glass filled with fluid which would shield radioactive rays but not impede vision. Shortly after the award of the contract a Modification was issued requiring the plaintiff to furnish the shield windows by subcontract with a Government-approved supplier, and a subcontract was let to Corning, which was about the only supplier experienced in this

limited field. There is strong indication that during the performance of the contract the Government and its firm of Architect-Engineers had numerous conferences with Corning from which plaintiff was excluded, so that in practical effect (as the ABCA eventually found) Corning was more like a vendor to the Government than a subcontractor to the plaintiff, because of the latter's lack of effective control.

[fol. 65] The plaintiff experienced difficulties with the assembling and installation of the shield windows. In June 1954 the plaintiff notified the contracting officer that changed conditions had been encountered materially altering the scope of the work and forcing plaintiff to suspend all operations until the extent of the changed conditions was determined and the contract modified to reflect them. Specifically the changed conditions related to the Koroseal gaskets for the shield windows and the adequacy of the glass in the shield windows supplied by Corning according to specifications. The plaintiff contended that the design of the Architect-Engineer for the gaskets was faulty and that the defendant's Architect-Engineer was arbitrarily reading into the specifications requirements for selected window shield assemblies not called for by the leading authorities. The contracting officer denied the plaintiff's claim for relief and directed it to proceed, holding in effect that there was nothing wrong with the specifications for the Koroseal gaskets and glass for the shield windows. On July 23, 1954, plaintiff appealed to the AEC and requested a hearing which was held.

[fol. 66] On July 23, 1957 the AEC Advisory Board on Contract Appeals (ABCA) rendered its decision on plaintiff's appeal for a time extension, and equitable allowances for additional costs incurred because of the alleged changed conditions (apparently at some interim time the plaintiff had changed the nature of its claim from the form originally presented to the contracting officer). The Board considered the issue to be whether the plans and specifications were adequate to achieve the desired result, assuming the plaintiff's competence. Plaintiff contended that the delays it suffered were not its responsibility but were due in part to the AEC's arbitrary action

in bypassing plaintiff and in part to the arbitrary action of the Architect-Engineer and the Corning Glass Company.

At the conclusion of a remarkably thoughtful and sympathetic opinion the Board denied plaintiff's appeal for an equitable adjustment for increased costs but allowed the appeal for an extension of time for excusable delay, and remanded the latter to the contracting officer for computation. The question for remand became moot when the defendant extended the plaintiff's overall time to the actual contract completion date. The Board made a series of specific findings of fact which in effect put the blame for the series of delays on neither side to the exclusion of the other, and instead held that the delays were [fol. 67] chiefly the result of the inherent difficulties of assembling and installing shield doors and windows recognized to be beyond the knowledge and experience of any person or company, and which involved new techniques.

The Board findings enumerated the specific delays which apparently involved a substantial total of lost time. It does not appear in the decision that the plaintiff particularized or even totaled its claim for equitable adjustment, so it cannot be determined from the administrative record what part of its claim would be for direct costs reimbursable under the contract and what part (if any) would be delay damages. Assuming that, the Board would have had no jurisdiction to adjudicate a claim for delay damages (quite apart from the authority of the agency to *settle* such a claim), it is apparent that the basic issue involved in the administrative proceeding was whether the plaintiff was unreasonably delayed by actions of the Government, a typical delay damages type of inquiry sounding in unliquidated damages.

Accordingly, since the final settlement and release entered into on March 22, 1957 reserved plaintiff's claim for "additional compensation" covering the shield windows complaint, it is concluded that the decision of the Board lacks finality, that the *Bianchi* decision does not apply, and that the plaintiff is entitled to a *de novo* trial in this court on the question of delays. It is urged, however, [fol. 68] that the parties give full consideration to the

possibility of obviating or at least curtailing the trial by adoption of the administrative record, which includes many exhibits and a 453-page transcript of testimony taken during a three-day hearing. It may be that the requirements of the parties as to the facts of the claim may be fully satisfied in the existing record, and that they would merely want the court to reappraise the evidence *de novo* without any bar of finality to overcome.

Finally, the defendant alleges in its answer that plaintiff has failed to allege that the action of the Board was arbitrary, capricious, etc. Assuming that the Board had no jurisdiction over the type of claim it considered, such allegations in the petition would be superfluous.

Shield Door Claim

On January 28, 1955, the plaintiff submitted a claim of \$4,457.25 to the contracting officer in the form of a proposal for a change order covering extra work on certain shield doors ordered by the Architect-Engineer a year earlier by means of changes made on shop drawings prepared by plaintiff's subcontractor. By a supplemental letter plaintiff asked for a time extension due to the delays involved.

[fol. 69] On October 27, 1955, the contracting officer denied the claim on the principal ground that the plaintiff had presented its claim a year late instead of within 10 days, as required by the Changes Article, and on the further ground that the changes made by the Architect-Engineer to the shop drawings did not change the contract drawings and specifications and thus constitute extra work. The plaintiff appealed to the AEC and a hearing was held before the ABCA. Through mistake no reporter was present to transcribe the testimony, but by agreement of the parties this was waived.

The Board made its decision on April 25, 1957, denying plaintiff's claim for adjustment under the changes clause but granting its claim for a time extension, remanding the latter to the contracting officer to determine the amount of the time extension. As to the major part of the plaintiff's claim the Board held that, while the contract drawings were inexcusably in error, the specifica-

tions themselves were adequate, so that the changes made by the Architect-Engineer to the subcontractor's shop drawings did not constitute changes under the changes clause. As to other changes, made by the Architect-Engineer to the subcontractor's shop drawings, the Board held that they did constitute changes to the contract drawings and specifications, but that the plaintiff's failure to present its claim within the 10-day period prescribed by the Changes Article barred any right to recovery, although the contracting officer had the discretion to consider such a claim but was not required to. The [fol. 70] Board then remanded the plaintiff's claim for a time extension to the contracting officer to determine the amount.

Three major points are to be made: First, the failure of the Board to prepare a transcript of its hearing prevents an adequate review by the court, and this lack is not cured because the plaintiff may have agreed to having no transcript made. The omission could be corrected by return of the claim to the Board for rehearing, but it is not believed that the *Bianchi* decision requires such a remand in every case where the prospect of even greater delay would be assured. The *Lianchi* decision must be read with discretion, and the Supreme Court's admonition against "delay at its worst" should be given consideration. To return the claim to the Board for a redetermination on the basis of a complete record would add perhaps several more years to the ultimate decision of a claim already 10 years old in its inception.

Second, it is observed that certain aspects of this item of claim might well have been subjected to a dispositive motion (if seasonably brought), such as the delay in presentation of the claim administratively and possibly the lack of authority of the Architect-Engineer, thus avoiding a trial.

Third, it is noted that at no time did the plaintiff claim administratively anything other than its direct costs, and made no claim for delay damages as it makes for the first [fol. 71] time in paragraph 7 (c) of its petition. On March 22, 1957, the plaintiff executed a full receipt and release with enumerated exceptions, including "Shield

Door Claim for additional compensation to Contractor". In view of the fact that the contracting officer was empowered to settle all kinds of claims (whether liquidated or unliquidated, sounding in breach of contract outside or inside the contract), it would seem that the plaintiff's failure to advance such a claim for settlement in the negotiations leading up to the final release would preclude the contractor from advancing it later as an afterthought. It would be a disservice to the contracting officer to permit a contractor to remain silent as to his potential claims while the parties are negotiating a final settlement, and then, after agreement is reached on a supposedly all-inclusive amount, the contractor reveals his new claims. The willingness of the contracting officer to enter into a final payment agreement would necessarily be substantially affected by his knowledge of delay claims, and if the contractor remains silent he is bound by his acceptance of the final settlement by way of accord and satisfaction. The particular reservation which the plaintiff inserted in the release in question would mean to the contracting officer only those direct costs relating to shield doors which the plaintiff had previously placed in issue, and would not include other aspects of the same claim [fol. 72] which plaintiff had held quietly in reserve. The precise situation was present in the recommendations for conclusions of law filed by this commissioner in *Brock & Blevins Company, Inc., v. United States*, No. 292-59, on December 6, 1963, and the reasoning given there is incorporated here by reference.

In short, the plaintiff is entitled to a *de novo* trial on those shield door costs which it claimed administratively, but not as to any collateral delay costs which it advanced subsequent to the execution of the release on March 22, 1957.

Amercoat Paint Claim

In March 1954 it was discovered that various metal components furnished by defendant for the "hot shop" required de-rusting and painting with Amercoat. Plaintiff performed this work under protest, contending that it was outside of the painting specifications and involved

dismantling, sandblasting, etc. There was some disagreement as to whether Amercoating the shield doors should be considered as part of the plaintiff's obligation to Amercoat the "hot shop" walls. The contracting officer's decision in June 1954 that shield doors were movable walls and thus were contract obligations of plaintiff to paint was reversed in December 1954 by successor Government representatives, and the parties agreed to a settlement [fol. 73] formula as to the direct costs of the extra painting. It does not appear that the plaintiff made any administrative claim for delay damages in this connection as it is urging here. The defendant contends that plaintiff was paid in full for this Amercoating claim, and that the only reservation in the release executed by plaintiff in March 1957 was as to an amount withheld but subsequently paid to plaintiff for some defective paint work. The defendant also says that the present claim for extra work and changed conditions is not relevant to a breach of contract action.

Since the plaintiff did not advance its present claim for delay damages at any time prior to execution of the release in March 1957 and the sole claim reserved in the release was later paid, on the principle of accord and satisfaction the plaintiff should be barred from further recovery. The immediate issue is whether *Bianchi* applies to preclude a *de novo* consideration of the administrative decision, and the above observation as to accord and satisfaction is technically not relevant and should perhaps be the subject of an appropriate motion. However, since the object of the present proceeding is to ascertain what areas of the claim will require trial, it is relevant to rule that, for other reasons, a trial here should be denied and court review be limited to an examination of the administrative record.

[fol. 74]

Delay-damage Claim

In paragraph 9 of its petition the plaintiff claims \$1,100,965.23 for defendant's failure throughout the contract to (1) "formulate a desired end-result prior to the award", and (2) "prepare adequate plans and specifications", thereby "imposing additional design and extra

work through shop-drawing procedures". It was alleged as part of this claim that the defendant's procedure for approval of shop drawings was slow and compounded the effect of other delays. The allegations made in support of this item of claim, to the extent they can be understood, seem to amount in large part to a catch-all category overlapping to an unknown extent certain parts of the specific claims made administratively as described in other parts of this document. No such claim was made administratively at any time prior to the release executed in March 1957, and none of the exceptions in the release correspond to this claim. The claim itself appears to be one for breach of contract for delays and contemplates unliquidated damages (despite the precision of the amount claimed), so that it would not have been cognizable by the AEC even if it had been presented. But the fact that it had not been presented and was not excepted in the release would make its entertainment in a review proceeding in this court dubious, for reasons given as to [fol. 75] other specific claims. This is more properly a subject-matter for a dispositive motion rather than the present determination of the applicability of the *Bianchi* rule. To the extent any of the elements of the claim are duplicated in the specific claims as to which a *de novo* consideration has been recommended, they are not subject to the *Bianchi* rule and trial here should be accorded, but as to the balance presented for the first time in the petition in this case and never presented administratively, no trial should be allowed but a dispositive motion should be entertained.

/s/ C. Murray Bernhardt,
Commissioner.

February 18, 1964

[fol. 76]

EXHIBITS TO DEFENDANT'S SUPPLEMENTAL BRIEF
CONCRETE AGGREGATE APPEAL No. 121, PART 1

UNITED STATES
ATOMIC ENERGY COMMISSION
P. O. BOX 1221
IDAHO FALLS, IDAHO

December 20, 1956

In Reply Refer To:

OC:WLR

Utah Construction Company
142 East Third South Street
Salt Lake City, Utah

Attention: Mr. Glen Staker

Gentlemen:

By letter dated July 16, 1956, you presented to me for decision as Contracting Officer under Contract AT(10-1)-645 your claim for additional compensation in the amount of \$109,356.00, which sum you represent you were required to expend as a result of the "Commission's failure to furnish concrete aggregate that would meet the contract specifications". Inasmuch as all the work under the contract was completed and accepted January 7, 1955, my investigation of your claim has been restricted to (1) a review of the Commission's records and (2) discussions with those few Commission and Ralph M. Parsons Company employees presently in the vicinity of Idaho Falls who had any connection with the work being performed under Contract AT(10-1)-645. As a result of that limited investigation I have made the following findings and determinations in accordance with the provisions of Article 15. of the contract entitled "Disputes" and Section 3.10 of the Rules of Procedure of United States Atomic Energy Commission Advisory Board of Contract Appeals (10 C.F.R. Chapter 1, Part 3). A copy of those rules is attached for your convenience.

FINDINGS

1. On March 19, 1953, the Government and the Utah Construction Company entered into Contract AT(10-1)-645 for the performance of certain construction work.

2. SC-18. *Concrete Aggregate* of Section II—Special Conditions of that contract provides, in part, that “Concrete Aggregate suitable for all standard portland cement concrete requirements on this job will be available to this Contractor at the price of \$2.90 per ton from the Commission’s stockpile near the ANP Area”.

Registered Mail
Return Receipt Requested

[fol. 77] 3. The Contractor’s July 16, 1956 claim for additional compensation is predicated on a failure of the Commission to make available suitable concrete aggregate in accordance with the provisions of SC-18 of the contract and is therefore a claim for damages for an alleged breach of contract by the Commission which is not properly before me for consideration under the Disputes Article.

DETERMINATION

It is my determination from the above findings that your claim is one for damages for breach of contract which cannot properly be considered under the Disputes Article. Nevertheless, I make the following additional findings of fact, without prejudice to this determination, in order to insure compliance with Section 3.10 of the above-referenced Rules of Procedure.

FINDINGS

4. Utah was not required by any provision of the contract to use the concrete aggregate which the Commission made available and SC-21 of Section II—Special Conditions of the contract applies only to mandatory Government-furnished property.

5. Cylinder tests conducted during June and July indicated the concrete being placed on the ANP Project

varied greatly with respect to compressive strength and that some of the concrete did not meet the minimum strength requirements established by Table 3A of Division S-2 of the Technical Specifications.

6. Utah claimed the wide variation in the compressive strengths of the concrete being placed on the ANP Project and the failure, in several instances, of the concrete to meet minimum strength requirements was due to the fact that the concrete aggregate which was being made available by the Commission was "overburdened with fine materials and seriously deficient in the coarser parts".

7. Tests made during July 1953 of the concrete aggregate being made available to Utah by the Commission revealed that the percentage of concrete aggregate passing the smaller sized screens exceeded the allowable percentages set forth in the gradation tables contained in Division S-2 of the Technical Specifications of the contract.

8. By letter dated July 21, 1953, over the signature of J. Warren Evans, Chief, Construction Branch, the Commission authorized Utah to increase the "five (5) sacks of cement per cubic yard as outlined in Section III, Division S-2, Page 7 in subparagraph (2), under paragraph b. 'Proportioning Limitations', to six (6) sacks of cement per cubic yard" pending an investigation and determination of the deficiencies in the strength of "recent concrete placed on the ANP Project".

[fol. 78] 9. By letter dated July 31, 1953 over the signature of Glen Staker, Project Manager, Utah notified the Commission that it regarded the poor quality of the concrete aggregate being "furnished" by the Commission as a changed condition under its contract and that said letter was to be regarded as notification of that changed condition.

10. The only monetary relief requested by the Contractor in its July 31, 1953 letter was payment for the additional cement used in making concrete if the Commission decided to utilize the existing concrete aggregate with the additional of one extra bag of cement per cubic year of concrete mix.

11. Utah was authorized and did use one extra bag of cement per cubic year of concrete mix placed on the

ANP Project from July 21 to October 30, 1953, by which time another Contractor had substantially completed re-processing the 1-1½" to ¾" coarse concrete aggregate.

12. By letter to the Commission dated February 7, 1954, Utah presented its cost for adding the one bag of cement per cubic yard of concrete mix from July 21 through October 30 which cost, including supervision, general expense, and profit, totaled \$8,640.93.

13. By item 3 of Modification No. 6, which was executed without protest by Utah, the contract was modified to provide that the Contractor should furnish and add to the concrete mix one bag of cement to each cubic yard of structural concrete placed under the contract between July 21 and October 30, 1953, as directed by the Resident Engineer, in consideration of payment to the Contractor of an additional \$8,640.93.

14. Although any failure of the Commission to make available suitable concrete aggregate under the contract would constitute a breach of contract rather than a changed condition as alleged in Utah's July 31, 1953 letter, Utah received all the monetary relief requested in its July 31, 1953 letter, which relief fully compensated the Contractor for the matter brought to the Contracting Officer's attention by its July 31, 1953 letter.

15. Although the concrete aggregate made available by the Commission may well have been a contributing factor in the production of below strength concrete by Utah, it was not the sole cause of that condition.

16. Although the Contractor's July 16, 1956 claim for additional compensation is predicated on the Commission's failure to make available concrete aggregate of the proper quality, as was its July 31, 1953 claim, the former is in fact a separate and distinct claim which had never been mentioned or presented to the Contracting Officer for consideration prior to July 16, 1956.

17. The submission of the Contractor's July 16, 1956 claim was not timely and the delay in presenting such claim has acted to the prejudice of the Commission in the investigation of the claim, especially with respect to [fol. 79] making findings as to whether the concrete aggregate made available by the Commission did in some way cause an increase in the cost of finishing the con-

crete placed on the ANP Project and the extent, if any, to which the increased cost alleged by the Contractor was attributable to the concrete aggregate used.

18. Utah has not indicated the nature of the additional costs alleged to have been incurred, nor has it indicated, even in a general manner, how the concrete aggregate made available by the Commission was responsible for an increase in the cost of finishing the concrete.

19. The sole support for Utah's July 16, 1956 claim consists of (i) a computation which indicates that Utah's actual concrete finishing costs exceeded its estimated concrete finishing costs (with a contingency factor of 50 per cent) by \$109,356.00, and (ii) a bare allegation that the Contractor was forced to expend that entire sum because the Commission failed to "furnish concrete aggregate that would meet the contract specifications".

20. Utah has not submitted evidence in support of its July 16, 1956 claim which would justify my finding that Utah incurred any additional cost for finishing concrete placed on the ANP Project as a result of the quality of concrete aggregate made available by the Commission.

DETERMINATION

As previously stated, it is my determination that your July 16, 1956 claim is a claim for damages for breach of contract which is not properly before me for consideration under the Disputes Article. However, even if that determination were overruled, it is my further determination in view of findings 4 through 20 that your July 16, 1956 claim must be denied in its entirety.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Officer
Contracting Officer

Enclosure:

Rules of Procedure

OC	E&C	USAF	E&C	M
WLRowberry:jm	Ashton	Heasley	Leppich	Johnson

12-20-56

[fol. 80]

CONCRETE AGGREGATE APPEAL No. 121, PART 2
UNITED STATES ATOMIC ENERGY COMMISSION
HEARING EXAMINER
FOR
CONTRACT APPEALS

Docket No. 121

RECEIVED
May 21, 1959
U.S.A.E.C.
Public Document Room
By

APPEAL OF UTAH CONSTRUCTION COMPANY
UNDER CONTRACT NO. AT(10-1)-645

Brief of the Contracting Officer on Motion to Dismiss
Utah's Appeal for its Failure to Make a Timely
Presentation of its Claim

This brief is submitted on behalf of the Contracting Officer, United States Atomic Energy Commission (hereinafter referred to as the "Commission"), Idaho Operations Office, Idaho Falls, Idaho, in support of his motion to dismiss the appeal of UTAH CONSTRUCTION COMPANY (hereinafter referred to as the "Contractor") for failure to submit its claim for additional compensation due to alleged increase in concrete finishing costs for approximately *three years* after the Contractor submitted its notice of a "changed condition" and for approximately one and one-half years after all work under the subject contract had been accepted.

FACTUAL SUMMARY

In the instant case the alleged changed condition was encountered on July 16, 1953. By letter dated July 21, 1953 the Commission directed the Contractor to add an extra bag of cement to the concrete mix "pending an in-

vestigation and determination of deficient strength requirements . . ." (Encl. 7 of Record on Appeal, hereafter termed "Record"). Tests revealed that the concrete being placed did not comply with the strength requirements of the contract (Encl. 8, Record). On 31, 1953 the Contractor transmitted to the Commission its "notice" of a "changed condition" (Encl. 10, Record). The *only* monetary relief requested in this letter of 31, 1953 was for the cost of adding an additional bag of cement.

[fol. 81] The Commission concluded its investigation (see Encls. 11 and 12, Record), and decided to cover the addition of the extra bag of cement until certain the concrete aggregates had been screened to eliminate the excess fines. This was done under a contract with another contractor (Encl. 17, Record), after the Contractor refused the job (Encl. 15, Record). After completion of the aggregates were screened, the Commission's authorization to use the extra bag of cement was rescinded (Encl. 18, Record). Thereafter, the Contractor submitted its costs for the extra bag of cement (Encl. 20, Record), saying *nothing* with respect to any other costs which might be incurred in the future or which were then incurred as a result of the alleged "changed condition." Acting in good faith, on the basis of the Contractor's representations and incitations that it desired reimbursement only for the added bag of cement, the Commission agreed to the Contractor's proposal and entered Modification No. 6 to the subject contract which provided for payment for the added bag of cement in the amount requested by the Contractor (Encl. 5, Record). Thereafter, the Commission continued its regular course of conduct, relying on the fact that Modification No. 6 had finally disposed of the entire controversy surrounding the quality of aggregate and the Contractor's claim thereon. It was not until approximately *three* months after the controversy concerning the aggregates that the Commission was made aware of the instant controversy, purportedly based on facts arising out of this same controversy.

LEGAL ANALYSIS

In the *Appeal of Frontier Drilling Company, USAEC-BCA*, Docket No. 93 (Nov. 1956), the AEC's Advisory Board of Contract Appeals stated:

"Unlike other articles of the standard contract, where the notice requirement serves only to insure a review of the claim while evidence on the merits is available, the requirement in Article 4 serves a second function. Extra costs involved in the Changes and Delay-Damages situations have already occurred; but in the Changed Condition situation the Contracting Officer may, given immediate notice, not only discover the true facts, but, *if he so desires, prevent or reduce the* [fol. 82] *costs by appropriate change orders.* It is for this reason that the Board ruled in *Appeal of McKee*, Docket No. 10, that *the notice under Article 4 must not only warn of the condition but of the intent to claim extra costs.*" (Emphasis added.)

In the *Appeal of Utah Construction Company, USAEC-BCA*, Docket No. 95 (April 1957), the Board stated:

"In general it is true, as the Board has said in other opinions, that the primary purpose of early notice is to afford the Contracting Officer an opportunity to ascertain the facts while they are fresh, and that, therefore, if the facts can still be determined, a late claim should be decided on its merits. However, we have recognized an additional purpose in early filing of claims under the 'Changed Condition' article—*namely an opportunity to mitigate damage by deletion of, or changes in, the work required.*" (Emphasis added.)

It is quite apparent that since the Contractor in the instant case did not present the subject claim for approximately *three years* after it had submitted its notice of a "changed condition", the Commission was not afforded the opportunity to mitigate damages, if any. The Board's interpretation of the notice requirement in the *aforecited* cases finds clear-cut and convincing support in the two equitable theories of estoppel and laches.

The instant case presents the classic case for the application of the principles of equitable estoppel. One of the

many facets of the doctrine of equitable estoppel is that of acquiescence. In *Harvey Radio Laboratories, Inc. v. The United States*, 126 Ct. Cl. 383, 391 (1953), the court stated:

"When a party with knowledge or the means of knowledge of his rights and of the material facts does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or abstains for a considerable length of time from impeaching it, so that the other is reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, though it be originally impeachable becomes unimpeachable."

[fol. 83] In *Mahoning Investment Co. v. United States*, 78 Ct. Cl. 231, 247 (1933), the court stated:

"All that is shown in these cases [of acquiescence] is that the acts of the party estopped were such as to mislead the party claiming the estoppel to continue in the course already begun, believing the same to be acceptable to the party estopped."

It is clear that the Contractor had means of knowledge of its rights since it had previously filed a claim pursuant to Article 4 of the General Provisions of the contract, and since it obviously had complete and sole control of its cost records, including the costs of concrete finishing.

From the period of July 16, 1953 until February 5, 1954 the only subjects of discussion between Contractor and the Commission with respect to the entire controversy were the strength aspects of the concrete and the Contractor's sole monetary claim, which was for the additional bag of cement. On February 5, 1954 the Contractor and the Commission entered into Modification No. 6 to the subject contract which finally disposed of the Contractor's claim. There would seem to be no question but that the Contractor recognized the contract modification as disposing of its only monetary claim and that it permitted the Commission to believe that the modifica-

tion had finally disposed of the entire controversy. This latter proposition is particularly compelling since the Contractor abstained for approximately two and one-half years (from February 1954 to July 1956) from impeaching the contract modification as not being dispositive of the entire controversy.

In *Joseph Behr & Sons, Inc. v. The United States*, 137 Ct. Cl. 688, 689 (1957), the plaintiff had purchased certain war surplus materials from the Government. The plaintiff claimed that there was a shortage in certain items and made a claim therefor which was subsequently satisfied. More than a year after the sale had been [fol. 84] consummated the plaintiff claimed that additional items were missing and claimed \$25,387.80 therefor. The court stated:

"In the first place, we think it is estopped to assert the claim sued on. When it presented its claim for the shortage of cots and the saw, and for pilferage from the trucks, it made no mention of the alleged shortage for which it now sues, although it says it knew of them at the time. And when it later paid the balance of the purchase price, less the amount claimed for the cots and the saw and the pilferage from the trucks, it deducted nothing for the items for which it now sues, and made no mention of them.

"When claim was made on account of the cots, the saw, and the pilferage from the trucks, defendant sent its agent McMillen to Maui to investigate, but he made no investigation of the alleged shortage now asserted, because no claim with respect thereto had then been made. When, more than a year later, the present claim was first asserted, plaintiff had disposed of all of the goods and no investigation was possible.

"Under such circumstances, we think plaintiff has waived the claim on which it sues, and is estopped from asserting it."

It is noted that in the instant case the Commission made an investigation concerning the strength requirements of the concrete as they were affected by the quality

of aggregate but no investigation was made with respect to the claim now asserted, because no claim had then been made. If the Contractor, within a reasonable time after it had given its "notice" of a "changed condition" had also notified the Commission that the quality of aggregate furnished by the Commission was causing an increase in finishing costs, the Contracting Officer could have made an investigation with respect to the finishing costs, and if he found the Contractor's allegations were true, and that the same constituted a "changed condition", he could have prevented or reduced the costs by appropriate change orders or other action. *Appeal of Frontier Drilling Co.; Appeal of Utah Construction Co., supra.* To presently allow the Contractor to assert its claim would clearly result in prejudice and injury to the Commission, since the Contractor has precluded the Commission from preventing or reducing the damages, if any. [fol. 85] The doctrine of laches is substantially similar to the doctrine of estoppel. It is generally stated that a claim will be barred on the ground of laches where there is a delay in asserting the claim; lack of knowledge or notice on the part of the defendant that the claimant would assert such a claim; and a injury or prejudice to the defendant in the event the complainant's claim is allowed; e.g., *Galliher v. Cadwell*, 145 U.S. 368, 372, 373 (1892); *Southern Pac. Co. v. Bogert*, 250 U. S. 483, 488, 489 (1919); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). The fact that there was a delay in asserting the claim for approximately three years after the notice of the changed condition readily appears from a reading of the Contractor's notice of a changed condition dated July 31, 1953, the Contractor's present claim dated July 19, 1956 and the affidavit of the Contracting Officer and the acceptance of work (which documents are attached to the subject motion). The affidavit of the Contracting Officer also states that the Commission did not have notice or knowledge of the Contractor's present claim prior to July 19, 1956. As heretofore stated, the delay by the Contractor in submitting its present claim has acted to the prejudice of the Commission.

CONCLUSION

The conclusion seems inescapable that the Contractor did not comply with the notice requirement of the "Changed Conditions" article since the Commission was not afforded the opportunity to mitigate damages, if any; that the Contractor acquiesced in the proceedings to dispose of the only monetary claim which it had presented, inducing the Commission to believe that no further claim would be presented; that the Commission has been prejudiced thereby; that the Contractor "slept on" its present claim for an unreasonable period of time; and, therefore, the Contractor is estopped from asserting its present claim or barred therefrom by reason of laches or precluded therefrom by reason of Article 4 of the General Provisions of the contract.

[fol. 86] To allow a contractor's claim under circumstances similar to the instant case would set a precedent which would make a farce out of the notice requirement of the "Changed Conditions" article. A contractor could submit an initial notice and claim and then, after all the work was completed, he would be allowed to "re-open" his original claim to include any costs which he "feels" are attributable to the "changed condition", thereby entirely precluding the Contracting Officer from mitigating damages, if any, and requiring its claim to be judged on the basis of facts which, if they exist at all, are entirely inadequate due to the passage of time; and, in the case of subsurface conditions, such facts are literally buried. As the Supreme Court of the United States stated in *Dickerson v. Colgrove*, 100 U.S. 578, 581 (1880):

"There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on."

Therefore, it is respectfully requested that the Contracting Officer's motion be granted.

DISPOSITION OF THE MOTION

Without prejudice to any other motion the Contracting Officer might present, it is respectfully requested that the Hearing Examiner make a full disposition of this motion prior to taking any other action with respect to this appeal. It is the position of the Contracting Officer that this motion is dispositive of the appeal and, therefore, will preclude the necessity of a hearing on the merits.

/s/ Howard K. Shapar
 Attorney for the Contracting Officer
 USAEC, Idaho Operations Office
 Iraho Falls, Idaho

[fol. 87]

RECEIVED

Oct. 5, 1959

U.S.A.E.C.

Public Document Room

By

UNITED STATES OF AMERICA
 ATOMIC ENERGY COMMISSION

Docket No. CA-121

IN THE MATTER OF THE APPEAL
 OF

UTAH CONSTRUCTION COMPANY
 UNDER CONTRACT No. AT(10-1)-645

Appearances

Gardner Johnson, Esq. for
 Utah Construction Company

Howard K. Shapar, Esq. and W. L. Rowberry, Esq. for
 The Contracting Officer of the Atomic Energy Commission

DECISION—October 1, 1959

Utah Construction Company of Salt Lake City, (Utah)
 executed a contract on March 19, 1953 with the United

States Atomic Energy Commission and was therein designated as "Contractor" to construct a large assembly and maintenance area at the Commission's National Reactor Testing Station in Idaho. Among other obligations, it was contemplated that Utah would pour approximately 18,000 cubic yards of concrete.

Upon completion of that work, in so far as herein material, a dispute has arisen between the Contracting Officer and Utah concerning the availability, suitability, and use of certain aggregates for cement which were utilized in the performance of this part of the contract. Utah contends that the aggregates were required to be furnished by the Government and its claim is based upon alleged changed conditions as that term is defined in the standard changed conditions clause. The contract contained many of the standard provisions of Government contracts, but it also contained special terms pertinent to this work. [fol. 88] Some of the important clauses are as follows; others are set forth later in the decision where detailed attention is directed to them.

"Article 1. Statement of the Work. The contractor shall furnish (except as the specifications may otherwise provide) the plant, equipment, labor and materials and perform the work necessary for the construction in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications, Invitation No. AT(10-1)-645,

"Article 4. Changed Conditions. Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall there-

upon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall . . . be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

The acceptance of the bid provided:

"In compliance with your Invitation for Bids No. AT(10-1)-645, dated December 22, 1952, the undersigned hereby proposes to furnish the plant, equipment, labor and materials (except as the specifications may otherwise provide) and perform the work. . . ."

The specifications of the general conditions for the construction contract provided, in part:

"GC-11. It is understood and agreed that the Contractor has, by careful examination, satisfied himself as to the nature and location of the work, the character, quality, and quantity of the materials which will be required and all other matters which can in any way affect the work under the contract.

"GC-18 *Claims for Extras*. The Contractor shall, when ordered in writing by the Commission, perform extra work and furnish extra material . . . shall be paid for at actual necessary cost as determined by the Commission, plus 10% for superintendence general expense and profit. The actual necessary cost will include all expenditures for material, labor, including compensation for insurance and social security taxes, and supplies furnished by the Contractor, and a reasonable allowance for the use of the plant and equipment where required, this allowance to be agreed upon in writing before the work is begun, but will, in no case, include allowance for office expenses, general superintendence or other general expenses."

A special condition respecting concrete aggregate was:

"SC-18. . . . Concrete aggregate suitable for all standard portland cement . . . aggregate require-

ments on this job will be available to this Contractor at the price of \$2.90 per ton from the Commission's stockpiles near the . . . Area.

.....

Approximate quantities of various gradations available in the concrete aggregate stockpiles are as follows:

.....

This Contractor shall assume full responsibility for the total 50,000 tons of stockpiled aggregate and shall make his own arrangements for all loading and handling in connection with his concrete batching operations. . . .

While Utah occasionally refers to the aggregates as Government-furnished materials, Special Condition 20 for the contract describes Government-furnished materials as requiring special agreement for—

“ . . . Government-owned materials held in storage by the Commission at the . . . Station . . . Subject to the right of the Contractor to inspect and reject the materials for good and sufficient reason prior to acceptance, the Contractor shall receive such materials in their then condition, without warranty expressed or implied on the part of the Commission as to serviceability or fitness for use.”

Utah filed a claim approximately a year and a half after the work was completed and accepted, and sought approximately \$109,000 for costs stated to have been incurred because of the poor condition of the aggregates. The Contracting Officer rendered his decision and found [fol. 90] that the claim appeared to be one for breach of contract over which he had no jurisdiction, and, in the alternative, he found that the appeal did not involve a changed condition within the contemplation of that clause of the contract, and finally that there had not been a timely presentation of the claim. An appeal having been taken from that decision in accordance with the Rules of the Commission for procedure in contract appeals, the Contracting Officer filed 3 motions: (1) to dismiss for failure to make a timely presentation of the claim; (2)

to dismiss for lack of jurisdiction, because either (a) the asserted claim is not within the terms of changed conditions clause of the contract, or (b) the asserted claim is for unliquidated damages; and (3) for a more definite statement of the claim.

An oral argument was held in Idaho Falls, Idaho on June 9, 1959, on these motions and briefs in support thereof, after which the Contractor filed an answering brief on July 23, 1959 and the Contracting Officer filed a reply brief on August 28, 1959.

It appears without dispute that sometime prior to July 17, 1953, the Contractor commenced work, and that on July 17 the Contracting Officer, through the Chief of the Construction Branch, suspended a portion, at least, of the concrete mixing and pouring in view of information received by him through tests that the cement mixture when placed in cast compression cylinders was deficient in the strength requirements as specified by the contract. On July 21, 1953, the Contracting Officer authorized resumption of work and stated that "... pending an investigation and determination of deficient strength requirements, ..." Utah was authorized to increase the concrete [fol. 91] mix by one bag of cement thereby increasing to 6, instead of the originally specified 5, bags of cement per cubic yard. From this point on in the transaction there appears to be a difference of views as to the cause of the deficient strength in the poured concrete and the costs involved in the full correction of that condition.

The substance generally designated as "aggregates" used by Utah in the concrete mix was located in a pile on the site of the Reactor Testing Station, and was nearby to the location where the mixing of cement and aggregates occurred, and also near to the place where it was poured into final form. After the information had been received that there was a deficiency in the strength requirements, tests were then undertaken of the aggregates. These revealed the presence of small sands, or "fines" which may have contributed in some way to the problems of deficiency in the strength requirements.

After this discovery, the Contracting Officer undertook the cleaning of the aggregates to remove this condition.

This was done through another contractor selected for this single purpose and at cost to the Contracting Officer of \$7,744. The provisions of the applicable specifications respecting cement mixtures contain detailed definitions of fine and course aggregates, and directions as to permissible limits of deleterious substances and organic impurities as well as strength requirements in a concrete mix. The proportioning limitations, as mentioned, first provided for 5 sacks of cement per cubic yard, but this was changed, when it was determined that the cement mixture produced by the Contractor was deficient in strength, to 6 sacks per cubic yard. The contract pro-[fol. 92]vided authority for this change in proportioning of the cement mixture under this clause, S2-03 (c):

"(1) *Changes by Engineer* may be made during progress of work should it be found impracticable to obtain concrete of required workability and strength with materials being furnished by Contractor; in such cases, changes in proportions or materials or both, may be made as necessary to secure required results."

Utah, in its appeal, relies upon 2 of its letters addressed to the Atomic Energy Commission; one written July 23 and one on July 31, 1953 in reference to this deficient strength condition being due to the condition of the aggregates. The first letter states, among other things that: "a visual examination of the aggregate piles reveals clean aggregate free from these objectionable small fines while in the center . . . the aggregate is coated together by these fines . . ." This letter also referred to the Commission's directive to add a bag of cement with the comment: "We . . . will expect to be reimbursed for the total amount of cement used in excess of the regular five (5) bag limit." And further, the letter concluded: ". . . . since the aggregate furnished by the AEC, which we are required to use under the terms of the contract, does not in any classification meet the specifications set up by the contract, we cannot be responsible if the result in concrete does not live up to the requirements . . . we request that steps be taken immediately to furnish us with concrete aggregates that will meet the specifications."

The letter of July 31 had similar conclusions . . . "immediate steps be taken to furnish us with aggregates . . ." and, further, ". . . this letter our formal notification that materially changed conditions have been discovered in the quality of the aggregate . . . furnished by the AEC. More importantly, this letter requested 4 things: "If the AEC [fol. 93] does not elect to furnish us with . . . aggregate which will meet the specifications set forth in Paragraph S-2-02¹ of the Structural Concrete Specifications:

1. The contract be modified and that compliance with this section of the specification be waived.
2. The modifications show that this waiver is being made at the request and for the convenience of the Atomic Energy Commission.
3. If it is the decision of the Atomic Energy Commission that the present aggregate be utilized by the addition of one extra bag of cement per yard of concrete mixed, that the same be considered an additional expense to the contractor above and beyond the original scope of the contract, which shall be a fully unquestioned reimbursable item.
4. The modification relieve the Contractor from any responsibility for unsatisfactory conditions that may result from the use of the present deficient aggregate.

The direction for the addition of one bag of cement was effective from July 21, 1952 to October 30, 1953; after this latter date the mix was in accordance with the original specifications of 5 bags per cubic yard. By a report dated November 6, 1953, tests revealed that after the cleaning by the other contractor, the aggregates were determined to be unusually clean.

[fol. 94] Following these events, Utah, on February 9, 1954, referring to (a) the direction to use an extra bag of cement, and (b) its own letter of July 23 requesting reimbursement, submitted a statement in the amount of \$8,640.00, which included provisions for the cost of cement and for its "Supervision, *General Expense*, and Profit."

¹ S2-01 of this Division of Technical Specifications provides in part: "SCOPE: The Contractor shall furnish all . . . material . . . to complete all structural concrete."

(Underlines added) This statement was paid by the Commission as reflected by Modification No. 6 to the contract, which is particularly important in that it not only paid the aforesaid claim, but embraced many other items which related to other phases of the contract, such as hot shop tunnel in a building, locomotive pit, flushwood door, etc. The modification recited that the parties agreed to modify the contract "in the following particulars, but in no others;" and then followed with the one payment of \$8,640.03 for the transaction in reference to the cost and general expense in adding a bag of cement per yard.

The record in this case also reveals that the Commission engineers become dissatisfied with the rate of progress by Utah in completing the contract, and expressed its dissatisfaction in a letter dated March 29, 1954. At or about the same time, Utah claimed an extension in contract performance time was due because of various matters not related to the structural concrete portion of the work, and in 14 additional modifications of the contract which were executed in November 1954 and which provided for additional payments, the AEC reserved its rights to contend that the contractor had not fulfilled the performance within the specified time, and likewise, Utah specified that its extension of time claim would be con-[fol. 95] tested in Appeal No. 91. Utah made no other reservation respecting any other claim or contention in any of these 14 modifications, and until July 19, 1956, Utah never communicated in any way respecting its endeavor to claim further sums on account of the bag of cement transaction. In fact, the communications in this record subsequent to July 1953 respecting structural concrete, indicated that engineers had determined that Utah was not mixing the aggregates thoroughly, nor long enough. In any event, on July 19, 1956, Utah wrote a letter stating that it claimed \$109,356, which is stated to be due because the Commission failed to furnish suitable aggregates to Utah and it "... was forced to expend an additional sum of \$109,356.00, as fully shown in the attached enclosures ..."

* It was also to this enclosure that the Contracting Officer's motion was directed to have a more definite statement. The enclosure

After the hearing of the oral argument, Utah stated that it rested its case upon its allegation that the situation in reference to the aggregates was "an unknown condition" of an unusual nature differing materially from that ordinarily encountered or generally recognized as inhering in work of the character provided for in the plans and specifications."

This recitation of these several facts has been made because it appears to be clear that Utah has failed to promptly notify the Contracting Officer of any claim it might have in relation to the condition of the aggregates. [fol. 96] In fact, it would seem that Utah might be considered to have misled the Contracting Officer by filing a claim in 1956 after requesting certain specific action in its letter of July 31, 1953 which the Contracting Officer fulfilled by cleaning the aggregates,⁴ and by making the requested payment not only for the extra bag of cement, but also the "general expense" in connection with it. This payment alone, of one general expense claim, while not stressed at the hearing or in the motion papers, could be construed as settlement of an account stated, which would of itself bar any further claims. The statement of an item in an account or claim, followed by the payment thereof, operates to eliminate controversy in reference thereto.

Reed v. Thomas, 134 Kans 849, 8 Pac 2nd 379
See: Restatement of Contracts, Sec. 422
Williston on Contracts, Sec. 1862
84 A. L. R. 114

In any event, the determination of a timely filing or conversely, an untimely one, must depend upon the vary-

set forth a computation of cost for a certain quantity of concrete mix, not identified for the time period involved as compared with an estimate of a normal cost.

³ This claim of lack of knowledge is to be contrasted with the statement in Utah's July 23, 1953 letter that: "A visual examination of the aggregate pile . . . reveals . . ." coupled with its certification at the time of its bid that it had visited the site, and also its agreement that it understood the quality of materials required.

⁴ The obligation of the Contracting Officer to do this is not clear.

ing circumstances of particular cases.⁵ In some instances, perhaps a filing made 2 months after an incident alleged to give cause to additional expense would be untimely, in others, maybe a year after an event would be considered timely. Whatever be the time interval, however, two aspects of a filing are fundamental, (a) the filing must give the Contracting Officer time to mitigate the extent [fol. 97] of the claim, if possible, and (b) the asserted claim must indicate an intention to claim a dollar amount. This latter element, of course, excludes both the July 23 and July 31, 1953 letters from being sufficient.

Appeal of Frontier Drilling Company, USAEC-BCA
DOCKET NO. 93 (1957)

The Contracting Officer contends that while consideration of laches and estoppel are distinct, yet the necessary ingredients of both are present here. While those matters might be more fully developed on a record if this case were heard on its merits, it is concluded that there is not any need to do so for the untimely character of the 1956 claim, which was the first indication of a dollar amount,⁶ seems readily apparent from the circumstances surrounding this transaction shown in the present record. The filing in 1956 was made approximately three years after the letter describing a changed condition, and approximately one and one half years after all work under the contract had been accepted.

The Contracting Officer also argues further that to consider specifically the basis urged by Utah for its claim shows equally conclusively that the changed conditions clause has no application. The initial facet of Utah's contention that the condition of the aggregate was unknown at the time of the contract was executed in March,

⁵ The changed condition clause of the instant contract requires notice to be given *immediately* by the contractor; if the July 1953 letters are the basis of the appeal, the claims there made were paid; if the 1956 letter is the basis, the time interval is more than usual and no justification for late filing was given.

⁶ Other than the statement of February 9, 1954, specifying cement costs and general expense, which was paid.

1953 appears directly contrary to Utah's admission 4 months later that even a visual examination of the stockpile showed excessive "fines". Utah also urges that the condition of the stockpile was as fathomless as if the needed aggregates were underground and test borings would lend no aid as to their character. Utah, in fact, stated at the oral argument that it believed there was not any difference here whether the aggregates were above [fol. 98] ground or underground, apparently regardless of what the visual examination revealed. The Contracting Officer also contends that the standard changed condition clause applies generally to an unknown underground condition related specifically to the main objective of the work to be accomplished, such as an excavation needed for footings for a building contracted to be constructed. For those situations, however, of conditions that are readily observable the Contracting Officer contends the relief under a changed conditions clause is not available, and while a hearing on the merits might better enable the Contracting Officer to present the factual support for this contention, the disposition of the claim as untimely obviates a determination of that phase of his contention. Likewise, if Utah argues that the description of the aggregates as "suitable" implied any warranty as to condition, or fraud in that representation, the remedy for unliquidated damages is beyond the jurisdiction of this proceeding. Suffice it to say, however, that Utah rests its case upon the changed conditions clause and the facts relied upon by Utah do not support that view. Utah also urges that this case be set down for hearing on the merits to permit Utah to expand this presentation, but the substance of Utah's claim is in the existing record. If the condition of the aggregates was observable upon a "visual examination", it must be presumed that Utah, the bidder, when it visited the site, looked at what there was to see.⁷ Credence must be given to Utah's admission that it could see the "fines" that may have caused, but it is not certain that

⁷ The contractor was to be charged with such knowledge of the physical conditions of the site as could have been gained by a reasonable site investigation. Bailey-Lewis-Williams of Georgia, Inc., ASBCA No. 4997, Army Appeals Panel 59-1, 5-11-59, BCA-2225.

that alone caused the deficiency in strength of the concrete mix.

[fol. 99] The foregoing determinations make it unnecessary to resolve the Contracting Officer's motion for a more definite statement by Utah of the portions of the Contracting Officer's decision from which the appeal is taken.

In addition to the foregoing findings and determinations, the Hearing Examiner *finds*:

1. Utah Construction Company (Utah), a Utah Corporation, was the contractor, as designated in a contract executed on March 29, 1953 with the United States Atomic Energy Commission for the purpose of constructing a large assembly and maintenance area at the Commission's Reactor Testing Station in Idaho.
2. Utah duly entered upon the performance of that contract which included the construction of several buildings, many appurtenant facilities, as well as the pavement of a large area with a concrete mix specified to be laid according to a formula comprising ingredients in proportions detailed in the contract, and including concrete and aggregates.
3. The contract contained a provision respecting the availability of aggregates which were described as suitable, as quoted in the foregoing findings, but did not impose any obligation on Utah to use those aggregates nor on the Commission to furnish them.
4. The condition of the aggregates or the use of that portion thereof containing excessive fines in the [fol.100] concrete mix and in part causing a deficiency in the strength requirements was corrected by the addition of an extra bag of cement as directed by the Commission's engineer on July 17, 1953.
5. The Commission never held Utah responsible for the condition of the concrete mix having a deficiency in the strength requirements.
6. Utah requested additional payment for the addition made by it to the concrete mix between July 21, 1953 and October 30, 1953 and the Commission paid the amount designated in the Utah statement

which included provisions for both the added cement and also for general expense as computed by Utah.

7. The Government warranty for Government-furnished material provided for the performance of the contract did not extend to the aggregates utilized by Utah.
8. The requests made by Utah in its July 17 and July 31, 1953 letters, after the direction to Utah to use an additional bag of cement in the concrete mix, were sufficiently fulfilled by the Commission and the Commission could properly conclude in 1953 as well as on March 20, 1954, when payment therefore was made, that Utah had no further claim for this transaction respecting excessive fines, or the condition of the aggregates, or for additional general expense in connection therewith.
9. The statement for additional expense filed by Utah and dated July 19, 1956 in the amount of \$109,356 [fol. 101] and described to be an additional cost incurred on account of the Commission's failure to furnish concrete aggregate that would meet contract specifications, was untimely filed and was an untimely presentation of a specific dollar claim.

DECISION

The appeal of the Utah Construction Company in the amount of \$109,356 is denied and its claim rejected. Further, the motion of the Contracting Officer is granted to dismiss the appeal from the decision of the Contracting Officer for failure to make a timely presentation of its claim.

SAMUEL W. JENSCH
Presiding Officer

Issued:

October 1, 1959
Germantown, Maryland

[fol. 102]

PIER DRILLING APPEAL No. 87

MEMORANDUM OF DECISION

IN THE MATTER OF THE APPEAL
OF
THE UTAH CONSTRUCTION COMPANY

UNDER CONTRACT No. AT(10-1)-645

Docket No. 87

I hereby adopt the recommendation of the Advisory Board on Contract Appeals dated April 30, 1957, that this appeal be (1) remanded to the Contracting Officer for further consideration of the claim for increased costs due to the "float rock," issue, but not as to any costs attributable to the delay beyond the completion of the drilling and (2) be denied in all other respects.

/s/ R. W. COOK
Deputy General Manager

[fol. 103]

/s/ H. M. Leppich

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

IN THE MATTER OF THE APPEAL
OF
UTAH CONSTRUCTION COMPANY
UNDER CONTRACT No. AT(10-1)-645
Docket No. 87

FINDINGS OF FACT AND RECOMMENDATION

ROBERT KINGSLEY
3518 University Avenue
Los Angeles 7
California

EDMUND R. PURVES
1735 New York Avenue, N.W.
Washington 6, D.C.

[fol. 104]

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

Docket No. 87
(Pier Drilling)

IN THE MATTER OF THE APPEAL
OF
UTAH CONSTRUCTION COMPANY

UNDER CONTRACT No. AT(10-1)-645

FINDINGS OF FACT AND RECOMMENDATION

JURISDICTION

The present appeal was taken by the Contractor, the Utah Construction Company, 101 Bush Street, San Francisco, California, the prime Contractors under Contract No. AT(10-1)-645 with the Atomic Energy Commission, on April 27, 1955, from decisions dated April 1, 1955, and April 19, 1955, by the Manager of the Idaho Operations Office and the Contracting Officer, Atomic Energy Commission, Idaho Falls, Idaho.

The appeal is in two parts—

(1) From the Contracting Officer's April 1, 1955, decision denying the Contractor's claim of February 18, 1955, for additional compensation in the amount of \$17,734.63 for the drilling of material alleged to be "float rock," the existence of which the Contractor contended constituted changed conditions in the pier drilling contract within the meaning of Article IV—Changed Conditions of the Contract; and

(2) The Contracting Officer's decision of April 19, 1955, denying the Contractor's claim dated March 31, 1955, for additional compensation in the sum of \$83,431.46 and a time extension of eleven months. The latter amount is to compensate the Contractor for alleged additional costs incurred by him as the result of the delay. The costs covered among other things expenditures for

winter protection, which costs allegedly would not have [fol. 105] been incurred had the drilling, unhampered by float rock, proceeded in accordance with the projected schedule of operations.

For purposes of simplification in this Findings of Fact and Recommendation, the term "Contractor" shall designate the Utah Construction Company, the term "Subcontractor" shall designate the George Casey Company of Los Angeles, California, and the term "Architect-Engineer" or "A-E" shall designate the Ralph M. Parsons Company, the Government's representative for conducting the inspection of the work performed under Contract AT(10-1)-645.

Article 15 of the General Provisions of the prime contract provides that:

"Disputes. Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The appeal was within the time provided and jurisdiction of the Advisory Board on Contract Appeals, United States Atomic Energy Commission, is clear.

PROCEDURE

An initial hearing in the matter was held in Conference Room "B", Atomic Energy Building, Idaho Falls, Idaho, on November 11, 1955. Although two other witnesses were called and testified, the initial hearing was held primarily to accommodate one of the Government witnesses, Mr. McDowell, who was available only on that occasion, being present in the room when the hearing on Docket 76 was taking place and being one of the witnesses on that other case. Mr. McDowell was due to leave for foreign lands at the termination of the hearings

[fol. 106] on November 11, 1955. The hearing was resumed in Room 59, Federal Office Building, Civic Center, San Francisco, California, on January 24, 1956, before Advisory Board members Edmund R. Purves and Robert Kingsley. Gardiner Johnson, Esquire, of the firm of Johnson and Stanton, San Francisco, California, and Peter Jacobson, Esquire, of San Francisco, California, appeared on behalf of the Contractor; W. L. Rowberry, Esquire, Attorney of Idaho Falls, Idaho, appeared on behalf of the Atomic Energy Commission. Mr. Purves acted as Chairman of the panel.

At the termination of the hearing both parties were requested to submit briefs.

The hearings were time-consuming and the files in this case are voluminous. In the opinion of the Board, both the time consumed and the material in the files are excessive inasmuch as the issue itself is relatively simple and the questions more or less factual. It appeared to the Board that much of the testimony was irrelevant. The Board must make mention of the fact that it was hampered by the absence of qualified expert witnesses.

BACKGROUND

The Utah Construction Company, prime Contractors for the construction of Assembly and Maintenance Area, Aircraft Propulsion Project, Contract AT(10-1)-645, USAEC National Reactor Testing Station, Idaho Falls, Idaho, included in its contract the drilling and excavation for piers or foundation shafts. The Subcontractor under the Contractor for this drilling and excavation was the George Casey Company of Los Angeles, California. However, the Contractor's claim is on behalf of itself. The hearings were not concerned with any dispute between the Contractor and its Subcontractor or any [fol. 107] relations between the two. The Contractor claimed that, in excavating for or drilling the shafts for the piers, conditions were encountered differing materially from those indicated on the contract documents and from the data furnished by those documents. The principal deviation from the furnished data is alleged to have been the existence of, and the encountering of, what is

spoken of throughout this issue as "float rock." This is a term not universally used in the construction industry throughout the United States. However, it does appear to be a term which is simply expressive in itself to describe a condition. This condition is the existence of individual stones or rocks of various sizes, detached from the principal bedrock by glacial or other geologic action, and subsequently covered by silt or other deposits so that the individual stones or rocks are suspended in the deposits below the surface of the ground. (When such stones or rocks have worked their way to the surface they are generally known as field stone.) However, it is possible for "float rock" to exist below the surface and, by reason of the absence of field stone on the surface of the ground, give no indication of its existence. It is also conceivable that core borings will fail to reveal the existence of "float rock." Float rock obviously presents difficulties in excavating and extracting the excavated material, especially when the excavation is confined to a series of holes of relatively small diameter. In such circumstances, float rock would present, to the excavator, a problem of extraction, comparable in difficulty with the excavating and extraction of solid rock. No indication of the existence of "float rock" was furnished to the Contractor. The Government may not have been aware of the existence of float rock, and we assume that it was not. [fol. 108] Lava contour maps were furnished showing the depth at which solid lava rock would be encountered as near as the depth could be ascertained from borings. Borings are admittedly an indifferent method at best, but the only method currently available. It developed at the hearing that bedrock was encountered in some places above the levels indicated on the drawings. The Contractor claimed that the Government withheld information and that the encountering of the "float rock" considerably delayed the excavation, to such an extent that the Contractor was forced into protecting the subsequent concrete work against the winter weather. The excavation was actually the form for the concrete piers to support the building. Delays were encountered which brought the actual pouring to the winter months with a consequent

risk of damage by freezing—a risk which the Contractor had to guard against and the cost for which guarding was not included in his original contract.

The Government claimed that the excavator did not use proper equipment and did not use what equipment he had properly and efficiently, in that: he used rotary rigs of a type suitable for straight earth digging on occasions when he should have used percussion rigs for rock digging; he did not organize the sequence of his work efficiently; his equipment was old and faulty; and the general operational problems, which included the traffic problems incident to the hauling away of excavated material, were not solved skillfully.

There were three bid item provisions pertaining to the method of payment for pier drilling—a lump sum price for bid items 3 and 4 (enclosure No. 1-A) was to include the cost of all pier drilling above the elevation 4747 feet; bid item 5 provided for linear foot prices for all unclassified excavation between 4747 feet and solid lava rock; bid item 6 provided for linear foot price for performing all solid rock excavation, the Government alleging that it had been assumed by both parties that no solid rock would be encountered above the 4747 foot level.

[fol. 109] By letter of June 1, 1953, the Contractor alleged sub-surface conditions materially different from those shown on the drawings and indicated and described in the specifications and ceased operations for pier drilling in accordance with Article 4 of the contract, which is as follows:

"ARTICLE 4. *Changed Conditions*—Should the contractor encounter, or the Government discover, during the progress of the work sub-surface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before

they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions."

The Commission wrote the Contractor on June 2, 1953, directing it to proceed with the work. On the basis of its June 1, 1953, notice, the Contractor, by letter of February 18, 1955, and its enclosures, presented a claim for \$17,934.63 for the increased cost of excavation resulting from encountering the "float rock." As noted, by its letter of March 31, 1955, the Contractor claimed an additional \$83,431.46, as the increased costs of construction of the building resulting from the delays caused by the "float rock" problem.

DISCUSSION

For the reasons set out below, the Board concludes:

(1) That "float rock" was encountered and that this did constitute a "changed condition" within the meaning of Article 4;

(2) That this condition caused some delay in the drilling operations;

[fol. 110] (3) But that this delay did not operate to delay the building construction; and

(4) That no additional cost to *the Contractor* resulted from the "float rock" condition, except insofar as it is liable over to its subcontractor.

As in other cases that have come to the attention of the Board, we find here that the absence of qualified expert testimony on behalf of either party is not only a source of annoyance, in that the Board does not feel confident that all questions have been answered correctly from a technical point of view, but also we feel that the presence of expert witnesses would have served to expedite hearings. It seems to the Board that in this case the question as to whether or not the Contractor

encountered conditions unanticipated by anyone (assuming, as we do, that the Government was not privy to information which it did not afford the bidders) should have been relatively simple to determine. Such a determination did not require a parade of witnesses, some of whom threw little light on the issue before the Board. It is true that the Government produced two witnesses, Mr. West and Mr. McDowell, who though not technically trained, nevertheless possessed sufficient rudimentary experience to enable them to speak with a certain amount of familiarity on the situations encountered, or rather should have permitted them to do so had they not been so obviously partisan in their testimony. In addition to the question as to whether or not the conditions encountered might have been anticipated, there are the corollary questions as to whether or not the Contractor's operation was performed efficiently. Here we have only the off-the-cuff criticism of men who were not trained or experienced in the multitude of problems involved in excavating and in the disposing of the excavated materials, and in the other hampering physical conditions, but [fol. 111] also were unable to comment expertly on such questions as to whether or not the delays encountered or assumed were sufficient to force the Contractor into pouring concrete during winter conditions. The Board, therefore, has had to draw its own conclusions from the testimony of partisan witnesses who were not necessarily completely expert in those fields on which they were testifying.

It is recognized that much of the evidence in general in courts is circumstantial and from biased witnesses, but in this instance we are dealing with questions of fact and questions of scientific knowledge, which, if properly presented to the Board, would facilitate the work of the Board and expedite the settlement of the issues involved.

I

The basis issue around which this dispute revolves is whether or not the existence of what is termed "float rock" constituted an unforeseen and unknown condition causing delay within the meaning of Article 4. There

certainly would appear to be sufficient evidence that "float rock" was encountered. Whether or not this might have been foreseen is open to very little conjecture in the eyes of the Board.

On one of the estimated drawing (No. ANP-004-IDO-1) the diagram of the results of the core borings indicates the existence of gravel at approximately elevation 4732 feet. It is significant that the existence of gravel appears, insofar as the estimating drawings are concerned, in only one location. If this existence of gravel had been indicated in more than one location, then the bidder might have assumed that gravel existed in general throughout the area. If the Government had reason to imagine that gravel or "float rock" was prevalent throughout the area, then it was culpable in not having advised [fol. 112] the bidders of its belief. Test borings are inconclusive but they are our only present means of determining subsurface conditions. Presumably at some future date science will devise a method of accurately disclosing subsurface conditions throughout an entire given area. Test borings are essentially spot checks and obviously incomplete and inconclusive.

The Board is of the opinion that, following common practice and procedures and customary assumptions, the Contractor was well within its rights in estimating that the excavation would be simple and capable of being performed by rotary rigs until bedrock was struck.

The Board is intrigued by the theory (expressed in the Contracting Officer's Findings) that the term "gravel" can include "float rock." Although there appears to be a dictionary definition which would substantiate this assumption, we are sure that it would be a rare Contractor in any part of the United States who would think that gravel is anything other than an ingredient of concrete, the material for the foundation bed of a slab, or the material for a garden path—none of which would present serious difficulties in extracting from mother Earth.

The contract called for various types of estimates on excavation. Naturally, the excavation of simple earth costs the least per unit measure excavated. Unclassified

material would cost more than simple earth, and bedrock, naturally, would be the most expensive to excavate.

There is some question as to the classification in which "float rock" would fall. It is the opinion of the Board that "float rock" would be unclassified. It is obvious to anyone with any experience in digging, or to any farmer or rancher who has ever dug holes for fence posts, that digging proceeds with ease until stone is encountered. Digging with ordinary implements through solid rock is impossible and extracting loose stone from a post hole, [fol. 113] the stone being imbedded in the earth, is difficult with varying degrees. In any case, it is far more difficult and time-consuming than the excavating of earth. The difficulty increases with the size of stone encountered; and when the stone exceeds in diameter the diameter of the excavation the difficulty may be nearly as great as if a solid rock were encountered, and equally as difficult if the stone is of any appreciable depth. In fact, "float rock" (if the term "gravel" is used to describe it) could be of sufficient size as to constitute bedrock for all practical purposes.

The testimony is not clear as to the amount and kind of "float rock" encountered, but that it was encountered by the Contractor does not appear to have been successfully contradicted by the Government.

A considerable amount of testimony revolves around the Contractor's equipment and efficiency of planning with which it was employed. A rotary rig was obviously producing satisfactory enough results for straight digging, so the Contractor was faced with a dilemma, on encountering "float rock," of either switching rigs—percussion for rotary—(the former being adopted for rock drilling) or taking a chance that the "float rock" encountered was sufficiently small to be extracted with rotary rigs. Lacking devices which would give him the answer to the question as to the nature and size of stone encountered unexpectedly, the excavator has to resort to guess work. Naturally, his desire is to get the job done as quickly and as economically as possible. Certainly a contractor would not intentionally make inefficient use of the equipment at his disposal. We find that the selection of equipment was reasonable and proper.

[fol. 114] A second criticism of efficiency advanced by the Government concerns the maneuvering of equipment on the site and the sequence of drilling the several shafts as they were sunk, and the traffic problems incidental to the arriving, loading and departing of trucks. There was no evidence presented to convince the Board that the Contractor had not organized his work and carried out his part of the work in as satisfactory a method as was possible under the circumstances which prevailed. Again we find that the procedures used were reasonable and proper.

The Government claimed that, under General Condition II, it was incumbent upon the Contractor to satisfy himself as to the conditions encountered. However, manifestly a Contractor cannot satisfy himself as to subsurface conditions unless some information is given to him. He can only assume that conditions will be satisfactory and if he assumes they are unsatisfactory, then the latter assumption, when taken in competition with other bidders who have not made the assumption, are almost certain to insure that he will lose the award of the contract, especially in public bidding. The Board does not find the Government's position tenable on its insistence on a liberal interpretation of General Condition II. This is insisting on the Contractor's gambling extensively on the unknown. A good deal of testimony and time at the hearing was taken up with matters relating to the authorship, authenticity, and even whereabouts of certain charts and work records. It is not clear to the Board how these documents would assist in determining whether or not changed conditions had occurred, although they might have thrown some light on the amounts that might be due the Contractor, should the Contractor's claims for delay have been upheld.

It is worthy of note that bedrock was encountered in places at elevations higher than had been indicated or anticipated. This, while resulting in a saving to the [fol. 115] Government, does not reflect well on the accuracy of the information which the Government furnished to the bidders.

II

The Government claims the following:

- "1. The concrete batch plant operated by the Contractor (Tr. p. 146) was not put into operation until May 26, 1953 (Tr. pp. 227-285), by which time over thirty pier holes had been drilled and were available for the pouring of concrete piers (Gov. Ex. I).
- "2. The drilling of pier holes remained *substantially ahead of the* concrete pouring of piers until approximately the 29th of June (Gov. Ex. I), and the concrete pouring of piers was never delayed for lack of an available pier hole in which concrete could be poured (Tr. p. 121).
- "3. At times pier holes were not filled with concrete for several working days after the drilling of those pier holes had been completed (Tr. pp. 124, 426), and there is evidence that drilled pier holes had to be re-excavated between the time the pier holes were first available for concrete pouring and the time the concrete was actually poured (Tr. pp. 123, 422, 423).
- "4. The pouring of the concrete piers for the pool area was completed by July 3, 1953 (Tr. pp. 320, 321), but the concrete for the storage pool was not poured until approximately July 30, 1953, almost four weeks later (Tr. pp. 232, 233). This delay occurred as a result of a question concerning the quality of the concrete aggregate (Tr. pp. 249, 250).
- "5. No concrete was poured on July 17, 18, 19 and 20, again due to the question concerning the quality of the concrete aggregate (Tr. pp. 253-255), and the concrete pouring operations were limited thereafter, allegedly for the same reason (Tr. pp. 260-270).
- "6. All placement of concrete for piers had been completed by July 31, 1953 (Tr. p. 169; Encl. 7), but concrete pouring of the first wall for Building No. 607 did not commence until August 11, 1953

(Tr. pp. 245, 250) [although the forms had been placed three weeks prior to that time (Tr. p. 271)], due to the question concerning the quality of the concrete aggregate (Tr. p. 245), and the concrete pouring did not proceed steadily thereafter, but was delayed due to other interruptions unrelated to the pier drilling (Tr. p. 250).

- "7. All placement of concrete for the piers was completed on July 31, 1953 (Tr. p. 169; Encl. 7), the date shown on the Contractor's May 13, 1953 Construction Status Chart, Building No. 607 (Govt. Exs. A, J-2) for the completion of the piers." (Govt. Brief, pp. 22-23).

[fol. 116] It appears from the record that serious questions arose as to the quality of the Government furnished aggregate. This resulted in substantial delays while test samples were poured and tested and while revisions in the proportions of cement and aggregate were decided on. Since the piers in question were the foundation for the entire structure, obviously pouring could not proceed until these matters were settled. In the opinion of the Board, it was this dispute which delayed construction and not the drilling delays attributable to the "float rock." But the Contractor's claims in the present proceeding are founded on its original letter of June 1, 1953, which referred only to subsurface conditions. While the Board, as indicated at the hearing, construes this letter as sufficient to raise the "float rock" issue (although with less clarity than could be desired) it certainly presented nothing as to the aggregate. In fact, there is no indication that any claim based on the aggregate has been presented to the Contracting Officer. Under these circumstances, delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding.

III

It seems probable that the drilling problems incident to the discovery of "float rock" did cause increased expense to the drilling subcontractor. But the present dispute is presented by the Contractor for its own account. Under

the cases, this presents a legal problem of some complexity. In *United States v. Blair*, 321 U. S. 720 (1944), the prime contractor was allowed to recover proven costs to a subcontractor, although there was no express proof that it was liable over. However, in *Severin v. United States*, 99 Ct.Cl. 435 (1943), cert. den. 322 U.S. 733 (1944), recovery by the prime contractor was refused where, by the subcontract, he was expressly relieved of liability over. [fol. 117] (See, also, *Warren Bros. Roads Co. v. United States*, 105 Fed. Supp. 826 (Ct. Cl. 1952)). As we read this series of cases, the prime contractor may recover against the Government if, but only if, it is liable over, but there is a presumption of such liability over where nothing to the contrary appears in the record.

However, in the instant case, the Contractor's Vice-President testified that, as of January 25, 1956, no formal claim had been made on it by the subcontractor (Tr. p. 366, lines 12-18), although there had been "a terrific amount of moaning about it" (Tr. p. 356, line 16). In this state of the record, the Board cannot determine whether liability over does or does not exist. If the Contractor resists liability over, or if the subcontractor is actually making no claim, or if such a claim is barred by the statute of limitations, there can be no recovery; but if there is liability over, then recovery is proper. But the record does not answer these questions, nor does it indicate the monetary extent of such liability, if any. While the Board could recommend a denial of relief for failure of proof, we think it better, in view of the Contracting Officer's absolute denial of the claim, to follow the practice of remanding for further inquiry by him in the light of this opinion.

FINDINGS OF FACT

1. Under date of March 31, 1955, the United States Atomic Energy Commission and the Utah Construction Company entered into Contract No. AT(10-1)-645, under which Utah undertook for a fixed price to construct the Assembly and Maintenance Area, Aircraft Propulsion Project, USAEC National Reactor Testing Station, Idaho Falls, Idaho, in Butte and Jefferson Counties.

[fol. 118] 2. The contract included the drilling or excavating of certain holes or shafts for piers and foundations, as called for in the specifications and as noted in the drawings.

3. The bidding documents called for the Contractor to include the excavation as a lump sum bid but permitted the Contractor to submit unit prices for the excavation of bedrock and for the excavation of unclassified material.

4. Certain data were furnished to the bidders to enable them to estimate the cost of excavation. These consisted of Drawing No. ANP-004-IDO-1 showing soil profile, and Drawing No. 902-2-3-4-ANL-U2 showing lava contour maps. The data furnished were in the customary form of data furnished and were seemingly adequate.

5. Utah, the prime Contractor, sublet the excavating to the George Casey Company of Los Angeles, California. However, this appeal is by the prime Contractor for itself.

6. After excavation was commenced loose rock was encountered below the surface at varying depths and prior to reaching bedrock. This loose rock is designated as "float rock" in this instance.

7. The Contractor was not required to carry the excavating to more than 2'0" into bedrock.

8. Encountered "float rock" does constitute an obstruction and the encounter is capable of causing delays—in that the removal of rock, loose or otherwise, is more difficult and time-consuming than the excavation of earth, sand or silt.

9. The Contractor exercised adequate skill and foresight in furnishing and maneuvering his excavating equipment and trucks.

[fol. 119] 10. The data furnished the bidders, while adequate, would not convey to the bidders the levels at which and the extent to which "float rock" would be encountered. The Contractor, therefore, did encounter changed conditions within the meaning of Article 4.

11. This changed condition caused some delay in the drilling and excavating operations; but, because of the delays caused by dispute over the quality of the aggregate, the drilling and excavating delays did not proxi-

mately cause delay in the construction of the building or in the final completion of the work.

12. It cannot be determined, on the present record, whether or not the changed condition above mentioned caused the Contractor any increased cost and the matter should be remanded for further inquiry on this point.

13. The Contractor is not entitled to any equitable adjustment in completion time on account of the changed condition referred to.

RECOMMENDATION

Accordingly, the Board recommends that the matter be remanded to the Contracting Officer for further consideration of the claim for increased cost due to the "float rock" issue, but, not as to any costs attributable to the delay beyond the completion of the drilling; and that, in all other respects, the appeal be denied.

Dated: April 30, 1957

ADVISORY BOARD ON CONTRACT APPEALS

/s/ EDMUND R. PURVES
EDMUND R. PURVES, Member

/s/ ROBERT KINGSLEY
ROBERT KINGSLEY, Member

[fol. 120]

In Reply Refer to:

OC:BB

April 1, 1955

Utah Construction Company
142 East Third South Street
Salt Lake City 10, Utah

Attention: Mr. George Putnam, Vice President

Subject: Your Feb. 18, 1955 Claim Entitled, "Changed
Conditions Affecting Pier Drilling"—Contract
AT(10-1)-645

Gentlemen:

We have received your February 18, 1955 letter, with enclosures, over the signature of your Mr. Glen Staker in which you make claim for additional compensation for alleged changed conditions encountered in pier drilling under subject contract. You state the changed conditions consist of the encountering of "float rock, not shown in the contract documents" the drilling of which "was every bit as costly and time consuming as drilling solid rock," and you submit a claim based upon computing all alleged float rock excavation at solid rock prices crediting a sum equalling the contract price for a similar quantity of unclassified excavation.

As you know, there were three bid item provisions concerning payment for pier drilling under subject contract. Your lump-sum price bid for Bid Item 1(f) was to include the cost of all pier drilling above the elevation of 4747 feet. Bid Item 5. provided for linear-foot prices for all unclassified excavation between elevation 4747 and solid lava rock. Bid Item 6. provided for a linear-foot price for performing all solid rock excavation (it being assumed by both parties that no solid rock would be encountered above the 4747-foot level referred to in Bid Item 1(f)). S1-03 of the technical specifications provided that shafts for foundation piers should be drilled a minimum of two feet into rock. In addition, upon discovery

that solid rock existed above the elevation of 4747 feet and the receipt of your June 1, 1953 letter noting this changed condition, an agreement was reached to pay Utah solid rock prices for any solid rock excavation required above the 4747-foot level. Further, Utah was advised by Leo A. Woodruff, AMP Resident Engineer, that the actual depth ordered to be drilled into bedrock was to be only two feet regardless of elevation at which encountered. We interpret his letter to Utah of June 26, 1953 as evidence of this understanding.

[fol. 121] The contract documents (see particularly Contract Drawing No. 902-2-3-4-ANP-U2) specifically indicated that unclassified excavation included gravel excavation. Gravel is commonly understood to include fragments of rock ranging in size from 2 mm. to a meter or more in diameter (see Webster's New International Dictionary, Second Edition, 1945, Unabridged). We have been unable to find any generally accepted definition for the term "float rock" (as used in your claim letter) which would differentiate it from the "gravel" classification. Therefore, we feel it is highly probable that much of the excavation which you classify as "float rock" excavation is in reality gravel excavation which you have contracted to excavate either for the lump-sum specified in Bid Item 1(f) or at the prices indicated in Bid Item 5.

Disregarding for the moment this conclusion based upon our interpretation of the specifications, and assuming (without conceding) for the sake of argument that the excavation of what you designate as float rock should not be regarded as unclassified excavation, there is yet a further reason why your claim for additional compensation must be denied.

Since the contract makes no special payment provision for "float rock" excavation as such, and we both agree that float rock is not to be regarded as solid rock (paragraph 3, your letter of February 18, 1955) any equitable adjustment would have to be measured by the excess costs for its removal.

I have determined and so find that only two types of rigs were used by Utah for pier drilling under the contract,

viz.: cable-type and rotary-type: further, that all solid rock excavation was performed by the cable-type equipment and therefore the linear-foot prices specified in Bid Item 6. must be regarded as the maximum allowable price for the use of this type equipment. I have further determined and so find that all unclassified excavation was performed by the rotary-type equipment and therefore the linear-foot prices specified in Bid Item 5. must be regarded as the maximum allowable price for the use of this equipment. I have further determined that all pier drilling down to solid rock was accomplished with the use of the rotary-type rig, and at no time were cable-type rigs used above the solid rock level.

Therefore even if, as assumed for the purposes above noted, "float rock" is to be distinguished from unclassified excavation, since identical excavation equipment was utilized for both types of material, it would appear that no excess costs were incurred which would entitle you to an equitable adjustment.

Under the circumstances it is my decision to deny the relief requested in your letter of February 18, 1955. This decision is to be regarded as final for the purposes of [fol. 122] appeal under the Disputes Article of the contract. A copy of the appeal procedures is enclosed herewith for your guidance should you wish to appeal the matter to the Commission's Advisory Board of Contract Appeals.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office

Enclosure:

Title 10—Code of Federal
Regulations

REGISTERED—RETURN RECEIPT REQUESTED

OC	OC	E&C	E&C	Mgr	M&R
WLRowberry:ns	BBoysen	FAHeasley	HMLLeppich	ACJohnson	

4/1/55

[fol. 123]

April 19, 1955

In Reply Refer To:

OC:WLR

Utah Construction Company
142 East Third South
Salt Lake City 10, Utah

Attention: Mr. George Putnam, Vice President

Subject: Your March 31, 1955 claim letter entitled,
"Contract AT(10-1)-645 Changed Conditions
Affecting Pier Drilling."

Gentlemen:

This is in response to your March 31, 1955 letter and the drawings referred to therein, over the signature of Mr. Glen Staker of your organization. The subject letter appears to supplement your February 18, 1955 claim letter on the same subject which dealt primarily with increased costs of pier drilling alleged to have resulted from changed conditions.

To some extent the allegations in your letter of March 31 overlap or duplicate those made in your February 18 claim letter. To that extent my decision of April 1 must be regarded as dispositive of any issue raised for the second time by the current letter. As a result, my decision of April 1 extends without further elaboration to the implication in your March 31 letter that percussion-type (cable-type) rigs were required to drill through the float rock (or gravel) encountered above bed rock levels and your reiteration that additional costs were incurred as a result.

In view of the determination in my decision of April 1, 1955, that no changed condition was in fact encountered from that described in the contract as bid upon, your request for time extension based upon the assumption of

REGISTERED—RETURN RECEIPT REQUESTED

having encountered a changed condition must necessarily be denied. Since the April 1 decision dealt essentially with your claim for additional costs and my decision by this letter is directed to your March 31 claim for additional time, it is appropriate to restate the finding and determination on the subject issue which will govern your right of appeal in the latter respect. Accordingly I have determined and so find that the encountering of a gravel condition which you have described as "float rock" does not constitute a changed condition within the meaning of Article 4 of the general provisions of the contract for the reasons advanced in my April 1, 1955 decision. Furthermore, the implication that percussion-type (cable-type) drills were required as a result of the float rock condition is contradicted by the facts determined in my previous decision that such rigs were utilized solely for [fol. 124] bed rock drilling and the rotary-type rigs were used for all other excavation without exception.

While your letter of March 31, 1955 makes general allegations of delay resulting from subsurface conditions described as changed conditions, no factual data is advanced to support the protracted delays alleged and your request for time extension therefor must be and hereby is denied. This denial of your claim for additional time necessarily extends to your claim for costs attributable to delayed performance alleged to amount in the aggregate to \$83,431.46. This letter may therefore likewise be regarded as a final decision denying your claim for the additional compensation and time requested.

A copy of the Commission's appeal procedures is enclosed herewith for your guidance should you wish to appeal these decisions to the Commission's Advisory Board of Contract Appeals.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office
Contracting Officer

Enclosure:

Appeal Procedures

[fol. 125]

/s/ H. M. Leppich

SHIELD WINDOW APPEAL No. 76

MEMORANDUM OF DECISION

IN THE MATTER OF THE APPEAL OF
THE UTAH CONSTRUCTION COMPANY

UNDER

CONTRACT No. AT (10-1)-645

DOCKET No. 76

I hereby adopt the recommendation of the Advisory Board on Contract Appeals dated July 23, 1957, that this appeal be (1) denied as to the claim for increased costs, (2) allowed as to the claim for an extension of time and (3) remanded to the Contracting Officer to determine the amount of additional time reasonably required to complete operations necessarily dependent upon the window installation which additional time shall be added to an extension hereby granted to November 2, 1954.

/s/ R. W. COOK
Deputy General Manager

[fol. 126]

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

IN THE MATTER OF THE
SHIELD WINDOW APPEAL

UTAH CONSTRUCTION COMPANY
Under
Contract No. AT(10-1)-645

DOCKET No. 76

FINDINGS OF FACT AND RECOMMENDATION

EDMUND R. PURVES
1735 New York Avenue, N.W.
Washington 6, D. C.

ROBERT KINGSLEY
School of Law
University of Southern California
3518 University Avenue
Los Angeles, California

[fol. 127]

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

DOCKET No. 76

IN THE MATTER OF THE
SHIELD WINDOW APPEAL
of
UTAH CONSTRUCTION COMPANY

Under Contract No. AT(10-1)-645

FINDINGS OF FACT AND RECOMMENDATION

JURISDICTION

The present appeal was taken by the Contractor, the Utah Construction Company, 100 Bush Street, San Francisco, California, price Contractor under Contract No. AT (10-1)-645 with the Atomic Energy Commission, on July 23, 1954, from a decision dated June 26, 1954, by the Manager of the Idaho Operations Office, Contracting Officer of the United States Atomic Energy Commission, Idaho Falls, Idaho. The appeal is from a decision by the Contracting Officer that changed conditions were not encountered by the Contractor within the meaning of Article 4 of the Contract as alleged by the Contractor. Article 4 of the Contract is as follows:

"Changed Conditions—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated on the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon

promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease or cost and/or difference in time resulting from such conditions."

The prime contract was for the construction of the Assembly and Maintenance Area and the Administration Area of the Aircraft Nuclear Propulsion Project at the [fol. 128] USAEC National Reactor Testing Station, Idaho. The appeal specifically concerns difficulties encountered by the Contractor in assembling the shield or viewing windows in the hot shop of the above project. The Contractor alleged that the difficulties encountered were in fact changed conditions and conditions which materially altered the scope of the work it had originally contracted to perform.

For purposes of simplification in this Finding of Fact and Recommendation, the term "Utah" shall designate the Contractor, Utah Construction Company, and the term "Board" shall designate the panel of the AEC Advisory Board on Contract Appeals.

Article 15 of the General Provisions of the prime contract provides—

"That all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer subject to written appeal by the Contractor within thirty (30) days to the head of the Department concerned or his duly authorized representative, whose decisions will be final and conclusive upon the parties thereto. In the meantime the Contractor shall proceed diligently with the work as directed."

That the appeal was within time and the jurisdiction of the Advisory Board on Contract Appeals, United States Atomic Energy Commission, is clear.

PROCEDURE

The matter was heard in conference room "B", Atomic Energy Building, Idaho Falls, Idaho, on Thursday, November 10, 1955. The hearing was commenced at 10:00

A.M. and proceeded throughout the morning of that day—the afternoon being given to the hearing on Docket No. 90. The hearing on Docket 76 was resumed on the morning of November 11, 1955 (after the members of the Board had had an opportunity to visit the site) and was continued through second and third days until adjournment at 2:30 P.M. on November 12, 1955.

Peter Jacobsen, Esquire, 100 Bush Street, San Francisco, California, and Gardiner Johnson, Esquire, 111 Sutter Street, San Francisco 4, California, appeared [fol. 129] on behalf of Utah. Bigelow Boysen, Esquire, Attorney of Idaho Falls, Idaho, appeared on behalf of the Atomic Energy Commission. At the termination of the hearing both parties were requested to submit briefs. Mr. Purves acted as Chairman of the panel of the Board.

Inasmuch as the matter concerned the assembly and installation of complicated devices, or collections of devices, designed to permit the viewing of operations in the hot shop without harm to the viewers, and inasmuch as the nature of the assemblage and installation was difficult to comprehend and fully understand from drawings and specifications, and especially inasmuch as the alleged difficulties encountered by Utah were of a nature that definitely required an intimate knowledge of the subject on the part of the members of the Board, the Board requested to view the actual installation.

The Board has heretofore directed correction of the transcript in sundry particulars. It has decided the appeal on the evidence produced at the hearing, on its inspection of the work, and on the briefs submitted.

The determination and findings of the Contracting Officer as outlined in his letter of June 26, 1954, to Utah consist of (1) a categorical denial of the existence of changed conditions, (2) a denial that, even if the allegations were established, they would constitute a basis for the modification of the contract under Article 4, (3) a reference to the lack of authority of verbal agreements, (4) a finding of responsibility of Utah with respect to the assemblage of the viewing devices, (5) an expression of opinion that the application of fundamental principles of mechanics and utilization of ordinary skill would have

resulted in the successful assemblage of the viewing devices, (6) a denial of the inadequacy of design of the windows, (7) a further denial of the inadequacy of the design, (8) a denial that the contract specifications were indefinite with respect to the viewing devices, (9) a [fol. 130] reference to a letter to Utah from the Ralph M. Parsons Company, the Commission's Contractor for design, which letter, according to the Government, contained no permission to Utah to fail to comply with the terms of the contract, (10) an allegation that Utah completed the assembly of certain of the shield windows prior to the written notification to the Commission and further stating that there are no changed conditions, and (11) a conclusion that Utah's reasons for suspension of operations were unwarranted and unauthorized.

BACKGROUND

The Utah Construction Company, the prime Contractor, entered into a contract with the Atomic Energy Commission on March 19, 1953, for the construction of Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project, USAEC National Reactor Testing Station in Idaho. As originally executed, the contract provided that the shield windows for the Hot Shop and Special Service Cubicle, in A&M Building No. 607, were to be furnished by the Government and installed by Utah in frames furnished by Utah. On June 29, 1953, the parties entered into Letter Order Modification No. 2. By its terms, Utah agreed to negotiate with a qualified manufacturer for the construction of the windows according to specifications thereafter to be provided by the Commission. Any agreement with such manufacturer was to be subject to the approval of the Commission. The order was terminable at the option of the Commission, in which event Utah was entitled to recoup its expenditures. The parties agreed to negotiate later over the price to be paid Utah. Whatever this remarkable document may have been, it clearly lacked both the definiteness and the mutuality required by law for a contract.

On August 5, 1953, pursuant to consent of the Commission expressed in letters dated July 20 and 24, 1953, Utah

entered into a contract with Corning Glass Works for the furnishing of the windows. On January 5, 1954, the parties entered into Modification No. 4 which was the [fol. 131] definitive Agreement contemplated by paragraph No. 7 of Letter Order Modification 2. Modification No. 4 was entered into as of June 29, 1953, and specified that Letter Order Modification No. 2 was superseded thereby. This latter modification purported —

“ . . . to provide that the Contractor shall assume the additional obligation to procure and assemble said windows, and shall furnish all plant, labor, equipment and materials, and perform all work necessary in accordance with final specifications and detailed drawings as referred to in procurement agreement dated August 5, 1953, between the Contractor and Corning Glass Works.”

By the terms of the August 5, 1953, agreement, in consideration of the payment in the sum of \$476,629, Corning was to furnish all shield windows, except those which are specifically designated on page 1 of the Agreement as follows:

“1. WORK TO BE PERFORMED

“The Subcontractor agrees to fully and completely perform all the work of—“Furnish all shield windows complete in accordance with purchase specifications MS-2-A and Division MS2, except shield window No. 6, Building No. 616, shield windows No. 1, No. 2 and No. 3, Building No. 609. In the event of any discrepancy between the above specifications, the provisions of Specification MS-2-A shall govern.”

However, Utah agreed to perform the work required by Modification No. 4 for the sum of \$592,495, and this last agreement would appear to be the final and only binding agreement.

It was required that shop drawings be submitted to the Architect-Engineer, Parsons and Company.

Certain change orders were issued by Utah to Corning—

1. Under date of August 27, 1953, concerning revisions of design which did not affect the contract price, and
2. Under date of September 16, 1953, which again did not affect the contract price.

Utah experienced trouble in assembling the windows on the site, and in a letter to the Commission, dated June 23, 1954, Utah referred to a meeting held on June 17, [fol. 132] 1954, at which all parties were represented and at which Utah disclaimed any expertness or previous experience in the assembling of the shield windows as specified. There had been some trouble having to do with defects in the glass and the reorientation of the glass within the frames, but the principal trouble concerned the distortion and slipping of gaskets. This distortion or slipping of the gaskets was a serious matter and obviously the windows would not have met with the specifications and in all probability would not have served their purpose and might even have been a source of danger had they been installed with distorted or slipped gaskets. The slipping of the gaskets occurred in the assembling of the windows. Utah blamed the slipping of the gaskets on faulty design and to substantiate its position cited trouble encountered by others on similar installations. Utah further charged that the specifications were inadequate and that there were faults in the glass itself (however these faults would not have necessarily of themselves contributed to the major difficulty encountered; namely, the slipping of the gaskets.)

Utah then said it had never encountered problems of this nature before and the rectification of the solution of problems encountered was beyond the scope of its contract and that, in effect, the troubles encountered constituted hidden conditions which materially altered the scope of its work. It therefore suspended work on June 16, 1954, and requested that the contract be modified to accommodate its situation.

On June 26, 1954, the Atomic Energy Commission made a categorical denial of the allegations as listed in the Findings under the heading of Procedure above.

Items 1, 2, and 3 of Modification No. 2 and Items 1 and 2 of Modification No. 4 are considered of sufficient importance to be included in the Background information.

Modification No. 2:

"1. Paragraph 6 of 'Schedule X' of Section II—Special Conditions, and all other drawings and specifications of Contract No. AT(10-1)-645 applicable and relating to the procurement, assembly and installation of the shield windows for the Hot Shop and Special Service Cubicle, A & M Building No. 609, [fol. 133] are hereby modified to provide that the Contractor shall assume the additional obligation to procure and assemble said windows, and shall furnish all plant, labor, equipment and materials, and perform all work necessary for the procuring, furnishing and assembling of said windows.

"2. The Commission agrees to exert its best efforts toward the development, completion and delivery to the Contractor, at the earliest possible date, final specifications and detailed drawings for said windows.

"3. The Contractor agrees, subject to terms and conditions contained herein, to undertake immediately, the performance of his obligations hereunder and to enter into early negotiations with a qualified manufacturer, the selection of whom shall be subject to the written approval of the Contracting Officer, leading to the manufacture of said shield windows."

Modification No. 4:

"1. Paragraph 6 of 'Schedule X' of Section II—Special Conditions, and all other drawings and specifications of Contract No. AT(10-1)-645 applicable and relating to the procurement, assembly and installation of the shield windows for the Hot Shop and Special Service Cubicle, A & M Building No. 607, are hereby modified to provide that the contractor shall assume the additional obligation to procure and assemble said windows, and shall furnish all plant,

labor, equipment and materials, and perform all work necessary for the procuring, furnishing and assembling of said windows in accordance with final specifications and detailed drawings as referred to in procurement agreement dated August 5, 1953 between the Contractor and Corning Glass Works."

"2. The Contract price, as specified by the contract as previously amended pursuant to Modifications Nos. 1 and 3 thereof, is, by virtue of this Modification No. 4, increased by the total amount of Five Hundred Ninety-two Thousand Four Hundred Ninety-five Dollars (\$592,495.00), plus any necessary supervising engineer service by Corning Glass Works furnished and charged in accordance with the terms of its aforesaid procurement agreement with the Contractor."

A letter of June 28, 1954, from the Ralph M. Parsons Company, the Architect-Engineer for the project, to the U. S. Atomic Energy Commission referred to a request from the Government for comments on Utah's letter of June 23, 1954. The Architect-Engineer's letter of June 28, 1954 is quite strongly phrased and is, in effect, a statement that the Utah Construction Company was admittedly inexperienced (and by implication incompetent) to fulfill the contract as modified with respect to the assembly and installation of the shield windows. The letter chiefly concerns the gasket problem and states that in the Architect-Engineer's opinion proper assemblage of the [fol. 134] windows required only normal skill and ability. It elaborates further on how the job might have been done, and alleges that the job was not overly difficult and could have been performed by any reasonably competent contractor. However, Utah insisted on claiming that the Government should allow time extensions and equitable allowances for additional costs incurred by the alleged changed conditions. These conditions were (1) the lateral movement and distortion of the Koroseal gaskets under compression, (2) specifications which were too indefinite to determine whether glass submitted by Corning met those specifications, and (3) the use of selective assembly procedure in assembling the shield windows.

It was apparent to the members of the Board that sometime during the course of construction the matter of personalities entered into the picture.

During the course of the hearing, the former Contracting Officer, now the Manager, testified to the effect that the personnel assigned to the project by the Utah Construction Company, especially in the supervisory categories, was not of the highest calibre that could have been provided by Utah and by implication that the difficulties encountered stemmed from the incompetence of the supervisory personnel provided by Utah. However, there is no evidence that the Government ever made formal protest to the Utah Construction Company with respect to the calibre of the supervisory personnel prior to the time of the hearing; and the Board regards the aspersion as unfounded.

It was also brought out during the course of the hearing that a representative of the Parsons Company subsequently suffered nervous disturbances and by implication, therefore, this individual might not have been enjoying full competence during the progress of the work. Again such testimony is of a nature which distracts from the principal issues; namely, the difficulties encountered in assembling the shield windows and whether or not the plans, drawing and specifications were adequate to achieve the result contracted for, assuming competence on the part of Utah.

[fol. 135] There is no question but that difficulties were encountered by Utah in assembling and installing the windows. Utah contended that it was subjected to delays for which it was not responsible and that the delays were caused in part by the arbitrary actions of the Commission—unusual in the normal conduct of business—such as by-passing the prime contractor and, in part, by the actions of the Architect-Engineer and the vendor—Corning Glass Company.

The Commission contends the issue of delays was not properly before the Board and moved that all claims and factual issues based on changes or delays be dismissed. The Board denied the motion on the ground that it would be impossible for the Board to rule on such a motion at

that time, but the Board stated that it would take the motion under advisement and that the matter could be argued further in the briefs.

DISCUSSION

The shield windows around which this dispute revolves, are not windows in the ordinarily accepted sense of the term, but rather they are devices to permit observers to view the operations taking place within the Hot Shop without danger to the observers of being affected by radiation. They are in effect protective devices which, at the same time, must be capable of affording clear vision through a thick protective concrete partition.

Actually the windows, each and every one of them, are a series of tanks with glass slides, the tanks being fastened together in a master frame, installed in the concrete partition, the tanks being filled with certain liquids to eliminate refraction of light and to prevent passage of radioactive rays. They are a vital and integral part of the project and obviously call for workmanship of the highest order, not only in the manufacture of parts which go to make up the windows, but in the assembly of those parts. The assembly and installation is admittedly a difficult [fol. 136] and time-consuming operation and one in which, once installation is made and the building is in operation, it would be extremely difficult, if not impossible, to correct any faults of manufacture or installation. Any failure of the viewing windows probably would render the project valueless, or greatly impair its value to the country. Therefore, there is no question of the extraordinary importance of the proper manufacture, assembly and installation of the windows. The record indicates clearly that Utah signed a contract and subsequent modifications of the contract which required it finally to completely furnish and install the windows. The record would further indicate that Utah agreed to adhere to the plans and specifications and to produce the building as called for. One can only assume that a contractor knows what he is doing when he signs a contract; and certainly on an item as large as this and as important as this a contract is not likely to be signed in a casual way.

There was some discussion as to the status of Corning; namely, is Corning considered to be a subcontractor of Utah or a vendor? The position of Utah throughout was that of prime Contractor with the possible exception of its relationship to Corning. Corning was either a subcontractor or a vendor. The factual relationship with Corning was as peculiar as the legal status of Modification No. 2. While the procurement contract was nominally between Utah and Corning, yet, as has been noted, that contract was subject to the approval of the Commission and several of its terms were dictated by the Commission in the letters of July 20 and 24, 1953. Once the contract was signed, both Corning and the Commission proceeded to ignore Utah. Technical conferences over manufacturing problems, testing, and other activities took place without the presence of, or even notice to, Utah. It is clear that, while for formal reasons, the Commission had interposed Utah as a prime contractor, the Commission staff and Corning regarded the Commission and not Utah as the de facto contractor. Under these circumstances, Utah can hardly be responsible for Corning's delays.

[fol. 137] The Board is of the view that, while by the express terms of the Delay-Damages article of the standard Government contract a contractor is liable for inexcusable delays of a subcontractor, it is not, in circumstances such as were here present, responsible for the delays of a vendor. The Board regards Corning, under the factual situation here created by the Commission, as having the status of vendor. In addition to the complete exclusion of Utah from all dealings after August 5, 1953, above noted, it will be remembered that both Modifications 2 and 4 required Utah to secure the windows, not by its own devices, but by the method of selecting an independent manufacturer. The Commission cannot require Utah thus to give up its own control, then exclude Utah from subsequent dealings, and still subject Utah to a responsibility for delays it was prevented from controlling.

Even if Corning had been a true subcontractor, the Board would have viewed Corning's delays as excusable. The shield windows herein involved were a new engineering concept, existing only on drafting boards. They posed engineering and scientific problems of the highest degree

of difficulty, most of which could be solved only by the trial and error method. Everyone appears to have proceeded with the utmost diligence to their solutions. The delays were clearly inherent in the work and excusable.

However, the Board is asked to determine whether or not changed conditions actually existed in the course of the contract within the meaning of Article 4 as alleged by Utah, and further whether or not Utah was completely unhampered in its execution of the contract. With respect to the latter it seems fairly obvious that Utah could not exercise much, if any, discretion with respect to the procurement of the materials for the windows, inasmuch as it appears that the Corning Glass Company is the only glass company competent to furnish the glass necessary for installation of this type. It is significant in this respect that meetings were held on the assembly of the windows and on matters related thereto which [fol. 138] included representatives of all parties with the exception of Utah. Just why the representative of a principal party was not permitted is beyond the understanding of the Board, and the exclusion was unjustified.

The Board is satisfied, however, that regardless of any possible lack of power on the part of Utah with respect to procurement, the materials furnished by Corning were the best and most suitable for the project that could be produced in the United States. In alleging changed conditions reference is made to the use of a so-called "Selective Assembly Process" by Utah. It is difficult for the Board to conceive that the use of the selective assembly system is of itself a changed condition. It simply meant that Utah was at liberty to rearrange the glass panels or to use other glass and it would appear to the Board that this is simply an amplification of Utah's powers and hardly constitutes a changed condition.

The allegation of being faced with circumstances over which it had no control insofar as assembly of the windows is concerned leads directly to the question of expertness and experience on the part of Utah. It is obvious that, in signing the contract, Utah believed itself to be competent to execute the work which it contracted to do and further that the Government was entitled to expert performance.

By subsequent modifications Utah undertook the complete job, but when it encountered difficulty it then claimed unforeseen circumstances. These unforeseen circumstances seem to consist chiefly of the creeping distortion or slipping of the gaskets.

While it was manifestly the responsibility of Utah to overcome this difficulty, it is somewhat significant that Utah received no assistance, that it had been excluded from important meetings and that it was left to its own devices. Subsequently, the Architect-Engineer claimed it knew what was wrong and how the job should have been done. It appears to the Board that hindsight rather than foresight played a part in the Architect-Engineer's claim. It further appeared to the Board that the exercise of [fol. 139] patience, and more expert study by Utah, could have led to a solution of the gasket trouble as later suggested by the Architect-Engineer. It was equally apparent to the Board that a better spirit of cooperation and a more practical application of a spirit of cooperation might well have prevented the difficulties, or might well have been of considerable help in overcoming those difficulties.

With respect to the allegation that only reasonable skills were required for a satisfactory performance of the contract, it must be pointed out that the Corning Glass Company itself admitted that the manufacture, assembly and installation of the viewing windows was a relatively new field and that no one knew very much about it.

The reason for the gasket difficulty seems to have been explained plausibly by the Architect-Engineer. The Architect-Engineer's witness stated at the hearing that the Glyptol cement applied to the frames was not given sufficient time to dry and hence when the gaskets were laid on the Glyptol cement it acted as a lubricant rather than as an adhesive. This explanation is so simple that the Board cannot help wondering why it did not occur to Utah in the course of assembly and possibly it did so occur.

There was a trial assemblage, an experimental assemblage, of one of the windows made by Corning at its Harrodsburg, Kentucky, plant. This assemblage was attended by representatives of all interested parties (including in this one instance, Utah.) Presumably the test

assemblage was successful. However, the test assemblage may well have been held under atmospheric conditions dissimilar to those encountered at the site and it would seem to the Board that the proper place for an experimental assemblage, as difficult as it may have been, would have been at the site rather than a location some 2,000 miles from the site and under local conditions which might not have obtained at the actual site of construction. Again it is obvious to the Board that throughout there [fol. 140] appears to have been a lack of realization of practical factors affecting the installation, and this lack of appreciation is not solely attributable to Utah.

Under date of July 6, 1954, Utah wrote to the Government, referring to the Government's letter of June 6, 1954, and conferences held July 1 and 2, 1954, but expressing disagreement with the determination made at those meetings and with the Government's letter. The letter of July 6 of Utah includes certain statements which are of interest and which do pertain to the issue of experience and competence:

1. Utah states "It is our opinion that in conscientious prosecution of the work involved in the assembly and installation of the shield glass windows, we have encountered conditions, previously unknown and unforeseeable, which are rendering the performance of said work materially different from the manner in which we could reasonably expect to carry out said work."

(Admittedly, conditions were encountered which in a sense were previously unknown and unforeseeable in that the work at hand involved operations in which no one apparently had any great amount of experience. However, it would appear that at the time it signed the contract, Utah surely could have foreseen that it was entering into a relatively unknown field and should have made a statement at that time or have adjusted its estimate to meet contingencies. Although it can be admitted that Utah knew relatively little about the operation which it was engaging to undertake, it was equally doubtful if anyone else knew very much about it either.)

2. "It is possible that execution of the work in the manner previously contemplated and in strict adherence

to the design will be a practical impossibility." (This is an assumption which was not borne out subsequently by the fact that the windows were assembled successfully.)

3. "Under our experience to date, and utilizing capable supervision and mechanics of the highest skill available, we have found it a practical impossibility to complete [fol. 141] the assembly and installation of the shield windows in such a manner as to prevent slipping of the prescribed gaskets and consequent leakage of fluids (with the exception of the two No. 1 type windows which, as you advised us during the meeting, have now been satisfactorily assembled and installed.)" (Apparently it was found possible to complete the assembly and installation of the shield windows in a satisfactory manner subsequently.)

4. "We are not in a position to question the accuracy or adequacy of the design; but we must point out that after utilization of the best skills available we have found it impossible to carry out the shield glass assembly, in conformity with the design details heretofore furnished to us, particularly in respect to the No. 2 type windows which are greater dimensions than the No. 1 type windows whose installation has been completed. (This is an ambiguous statement starting off by asserting that they cannot question the accuracy and then they, by implication, proceed to do so.)

5. "We disagree with the statement contained in your letter of June 18, 1954, to the effect that determination of correct procedures is our responsibility. Modification No. 4 provides that the assembly of the windows is to be performed in accordance with certain specifications and drawings. In diligent adherence to the details furnished to us to date we have found it a practical impossibility of accomplishing the desired result." (Again this would appear to be a somewhat inconsistent statement and furthermore the Board interprets Modification No. 4 as giving Utah full responsibility which would, by implication, include the determination of correct procedures.)

The Board is somewhat at a loss to determine just what made Utah issue the ultimatum which it did and to admit defeat. It is understood that a degree of frustration could be attained after repeated failure, especially when

the Contracting Officer and the Architect-Engineer were not evidencing any desire to cooperate, but whether that [fol. 142] is true or not, it still does not relieve Utah, the prime Contractor, from the terms of its contract.

Utah makes reference to delays inflicted upon it which were beyond its control. In the matter of delays due to a variety of causes, all the subject of testimony, it appears that (1) inasmuch as the Board holds Corning in the light of a vendor, Utah cannot be held accountable for the delays of the vendor where, as here, the Commission elected to conduct its dealings directly with the vendor; (2) the Commission decided that a process known as the "Selective Assembly Process" should be employed which, while not a "changed condition," still was a change in the specifications of work which undoubtedly subjected Utah to additional burden and delay, regardless of whether or not had such a process not been employed an inferior result would have been obtained; (3) the design of the windows was subject to revision, sometimes of an extemporaneous nature, a practice which naturally resulted in delays, although revision of design may well have resulted in an improved product or even have been necessary; (4) Utah argues that certain of the revisions were unnecessary but the Board is of the opinion that the issue of necessity of revision is debatable and indefinite and has little or no bearing on the fact that Utah was subjected to delays that were not of its making; (5) the Commission did delay Utah for some 75 days following the reported appearance of haze or cloudiness in the glass before the Commission allowed Utah to proceed with the assembly.

It does appear to the Board that the *modus operandi* on changes and shop drawings finally adopted was not calculated to assure a maximum expedition and that the matter of the arbitrary imposition of the selective assembly process without consent or approval of Utah did cause delays which were not attributable to Utah. The Government, however, moved that the claim for such delays be dismissed, basing its motion, which was made at the hearing, on the fact that such delays do not come within the meaning of Article 4 and further that claims for excusable delays and claims for adjustment in some and consideration for contract changes must be pre-

sented to the Contracting Officer in accordance with requirements of Article 9, which was not done. While Utah's letters of claim cited only Article 4 (Changed Conditions), still the Contracting Officer was promptly advised of the facts sufficiently to bring into play the operation of Article 9 (Delay-Damages). While the Board has held that claims under Article 4 require special forms of notice, Article 9 requires only that the *facts* be brought to the attention of the Contracting Officer. And the Board has recently held (see Docket 96 involving this same Contractor) that where a claim meets this requirement, the Contracting Officer and the Board must grant relief if justified, even though Article 9 is not specifically invoked.

In substantiating its case against Utah the Government cites the Supreme Court decisions in *The Harriman*, 76 U.S. 161 (1889), and *Carnegie Steel Company vs. United States*, 240 U.S. 156 (1916). In the latter case, involving the matter of manufacturing 18-inch hard-faced armor plate in accordance with drawings and specifications which were part of the contract, the Court stated, at 165:

"Ability to perform a contract is of its very essence . . . and a delay resulting from the absence of such ability . . . is not a cause extraneous to it (the contract) and independent of the engagements and exertions of the parties."

However, the Board finds that there is a distinct difference between that case and the circumstances surrounding Utah's appeal in this instance, inasmuch as the Carnegie Steel Company was left to its own devices to produce the armor plate and the Utah Construction Company, in the matter of the shield windows, was surrounded by modifications which left the actual determination of manufacture and assemblage in the hands of Corning, but required that Utah be responsible. In the Carnegie case, Carnegie was responsible only for its own manufacturing. In this instance Utah is held responsible for others' manufacturing and for the design of others and for the constructions of others for assemblage. Therefore, although [fol. 144] Utah signed a contract to furnish, supply, assemble and install certain shield windows, there was con-

siderable advice and guidance of others of such a nature as to possibly be construed as interference. This might have been a factor in the introduction of personalities into the issue, and may well have led to a situation on the site which was not conducive to expeditious prosecution of the work.

The Board cannot help sensing an atmosphere of evasion of responsibility all around. The Government, when it could not prescribe the solution of the problem, assigned the responsibility for the solution to its prime Contractor, Utah. It does appear to the Board that, with a little cooperation and mutual understanding, this entire issue could have been avoided. Again the Board is struck by the significance of the meeting held at the Argonne National Laboratory project on February 10, 1954, at which determinations were made which may not have been of the utmost importance with respect to the specific questions here involved, but nevertheless were of concern to Utah and which, had it not been excluded from that meeting, might have helped it to improve its operating procedures.

The Board must conclude that the drawings and specifications were adequate; that Utah had been given as much information as anyone would be given naturally for the assembly and installation of devices in the manufacture and installation of which no one was experienced; that there is no reason for Utah to have anticipated the displacement of the gaskets; that Utah performed to the best of its ability; that it was furnished certain drawings showing assemblage of the windows; but that, although the difficulties encountered by Utah were unforeseeable—in other words, that there was no reason for Utah to have anticipated the difficulties which it actually encountered—nevertheless those difficulties did not constitute changed conditions. It was, however, subjected to delays that were not of its making.

It is well conceivable that the difficulties encountered by Utah arose in large part, if not in all, from its inexperience and from its workmanship. In other words, [fol. 145] the conclusion can be drawn that Utah simply did not know how to do the job. However, the Board is not convinced that anyone else knew how to do the job either, including Corning, the Architect-Engineer, or the

Government, prior to the knowledge painfully acquired on the job.

FINDINGS OF FACT

1. Under date of March 19, 1953, the United States Atomic Energy Commission and the Utah Construction Company entered into Contract No. AT(10-1)-645, under which Utah undertook for a fixed price to construct the Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project, USAEC, National Reactor Testing Station, Butte and Jefferson Counties, Idaho.

2. The contract, as modified by Modifications 2 and 4 included furnishing, assemblage and installation of certain shield windows.

3. The contract specifications called for satisfactory performance.

4. The specifications and drawings were as adequate as any drawings or specifications could be in light of the nature of the work involved, it being recognized that a relatively new and unknown field was being entered.

5. In the assembly of the windows Utah encountered certain difficulties, the chief of which was the sliding of the Koroseal gaskets.

6. Certain delays were encountered including—

- (1) Delays incident to time consumed in the provision of approved drawings and specifications.
- (2) Delays incident to the employment of the Selective Assembly process.
- (3) Delays incident to the reorientation of glass slabs.
- (4) Delays incident to the rejection of chipped glass.
- (5) Delays incident to the overcoming of the slipping of the gaskets.
- (6) Delays incident to the Government's objection to the reported mineral oil haze.

[fol. 146] 7. Utah exercised the best workmanship and ability which it was capable of producing.

8. The difficulties encountered might have been more readily overcome by anyone experienced in the assembly

of this particular type of window, but no such person appears to have existed.

9. Utah was not assisted materially in the overcoming of these difficulties by either the Architect-Engineer or the Government at the time the difficulties were encountered; however, it is recognized that the responsibility for satisfactory performance was exclusively that of Utah.

10. The difficulties encountered did not constitute changed conditions within the meaning of Article 4, nor do any of the delays alleged by Utah come within the scope of that article.

11. Utah contracted to produce a satisfactory job and the Government was entitled to expect a satisfactory job on the basis of the contract.

12. The delays encountered, as set forth in Finding No. 6, were due to unforeseeable causes beyond the control and without the fault or negligence of Utah and resulted in delay of completion for a period of time extending until after November 2, 1954.

RECOMMENDATIONS

The Board recommends that the appeal be denied insofar as claim for increased costs is concerned but that the appeal be allowed in the matter of an extension of time for excusable delay.

The extension should be until November 2, 1954, plus such additional period as was reasonably required to complete operations necessarily dependent upon the window installation; and the matter should be remanded to the Contracting Officer with directions to ascertain the extent of such additional period and thereafter to issue his order [fol. 147] extending the time for completion of Contract No. AT(10-1)-645 accordingly.

ADVISORY BOARD ON CONTRACT APPEALS UNITED STATES ATOMIC ENERGY COMMISSION

By /s/ ROBERT KINGSLEY
ROBERT KINGSLEY, Member

By /s/ EDMUND R. PURVES
EDMUND R. PURVES, Member

July 23, 1957

[fol. 148]

In Reply Refer To
E&C:HN

June 26, 1954

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Utah Construction Company
142 East Third South Street
Salt Lake City, Utah

Attention: Mr. George Putnam
Vice President

Gentlemen:

We have received your letter of June 24, 1954, over the signature of Mr. Staker alleging that conditions have been encountered in connection with your assembly of shield windows under your Contract AT(10-1)-645, which constitute changed conditions within the meaning of Article 4 of that contract; that such conditions have materially altered the scope of the work, and have necessitated your suspension of all operations in connection with the assembly of the windows. Your letter also encloses a copy of your previous letter of June 23, 1954, to the Commission which, you state, sets forth these conditions in detail. You ask that the Commission determine the extent of the changed conditions alleged and make any necessary modifications to your contract.

DETERMINATION AND FINDINGS

1. After careful study and investigation of the matters raised in your letters of June 23 and 24, 1954, I have determined and so find that none of the allegations therein support the conclusion that your Company, as the Contractor, has encountered "during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawing or indicated in the specifications, or unknown conditions of an unusual na-

ture differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," as contemplated under Article 4 of the subject contract.

- [fol. 149] 2. Additionally, and based on such study and investigation, I have determined that none of the matters alleged in your said letters of June 23 and 24, 1954, would, even if established, constitute any basis for modifying your contract under Article 4 thereof as requested. More specifically, I have made the following additional determinations and findings in response to particular allegations made in the letters referred to.
3. Any oral discussions prior to the effective date of Modification 4 to the subject contract, pertaining to the competency of Utah Construction Company in the line of assembling shield windows, are irrelevant to the rights and obligations of the contractual parties as they now exist under the terms of the written agreement between them. Contract paragraph GS-11 expressly states: "No verbal agreement or conversation with the Commission or the Contracting Officer either before or after the execution of the contract, shall affect or modify any of the terms or obligations herein contained."
 4. The written Contract AT(10-1)-645, as amended, between Utah and the Government is the measure of Utah's responsibility to perform the purchase, assembly, and installation of the shield windows according to the design specifications despite any subsequent disclaimer by Utah to the contrary.
 5. By the application of generally accepted fundamental principles of mechanics and the utilization of the ordinary skill of the appropriate crafts, the shield windows in question can be assembled as required by the contract specifications without rupture of the Amercoat membrane or other damage.
 6. There is no basis for your contention that a serious question has arisen as to the adequacy of the design with respect to the Koroseal gaskets.

7. There is no inadequacy of design with respect to glass, steel plates or Amercoat membrane to which any failure of the gasket scale upon introduction of Zinc Bromide into the tank could be attributed.
8. The contract specifications are not so indefinite or non-definitive as to preclude a determination whether the glass purchased by Utah meets the contract specifications.
9. The letter to Utah from the Commission's Contractor. The Ralph M. Parsons Company, dated May 20, 1954, suggesting a procedure under which certain glass purchased by Utah and appearing on preliminary examination to fall below the contract specifications, might nevertheless be usable if installed in a less critical window location, cannot be construed to mean that the specifications in question are so indefinite as to preclude determining compliance of the glass therewith; nor did said letter waive the rights of the Commission under the purchase order agreement between Utah and Corning Glass Company (approved by the Commission) to ultimately reject (prior to final settlement thereunder) any glass failing to meet the specifications; nor did such letter alter any contractual rights Utah may have under its said purchase order agreement with Corning Glass Company, to reject any glass not meeting the required specifications if it should find such rejection necessary in meeting its contractual obligations to the Commission under Contract AT(10-1)-645, as amended.
10. Commission action favorable to Utah as requested in its letter of June 24, 1954, is unavailable to Utah for the additional reasons that (1) the alleged changed conditions were not left undisturbed pending written notification to and investigation by the Contracting Officer, as required by that Article, but, on the contrary, Utah completed the assembly of certain of the shield windows prior to any written notification to the Commission; and (2) all of the conditions which presently appertain to the work required to be performed by Utah under Modification

4 to the subject contract have remained unchanged, normal to, and inherent in that work since the date said Modification 4 was negotiated.

11. Any suspension of operations for the reasons outlined in your letters of June 23 or 24, 1954, is entirely unwarranted and unauthorized by Article 4 or any other provision of Contract AT(10-1)-645, as amended.

DECISION

On the basis of the foregoing determinations and findings, it is my decision to deny the relief requested in your letter of June 24, 1954, and this letter is to be regarded as formal notification to you of my decision.

Your attention is invited to the fact that should you elect to appeal this decision under Article 15 of the subject contract entitled "Disputes," neither such election nor the appeal itself will relieve you of the obligation expressed in that Article to diligently proceed in the meantime with the prosecution of the work. You are accordingly directed to proceed with the work as required under the contract.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office
Contracting Officer

cc: JWE Cont. File—645
B. BOYSEN
W. H. BRUMMETT
LEO A. WOODRUFF

cc: Glen Staker, Utah
Const. Co.—Site
Aetna Cas. & Ins. Co.

Encl: (1)

Copy of Rules Governing Procedures for Appeal to Advisory Board of Contract Appeals—USAEC

[fol. 151]

/s/ H. M. Lippich

SHIELD DOOR APPEAL No. 95

MEMORANDUM OF DECISION

IN THE MATTER OF THE APPEAL OF
THE UTAH CONSTRUCTION COMPANY

UNDER

CONTRACT No. AT (10-1)-645

DOCKET No. 95

I hereby adopt the recommendation of the Advisory Board on Contract Appeals dated April 25, 1957, that this appeal be (1) denied as to all matters except the claim for a time extension and (2) be remanded to the Contracting Officer for a decision of the claim for a time extension based upon specific findings of fact, subject to further appeal if desired.

/s/ R. W. COOK
Deputy General Manager

[fol. 152]

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

IN THE MATTER OF THE APPEAL OF
UTAH CONSTRUCTION COMPANY
(Under Contract No. AT(10-1)-645)

Docket No. 95

FINDINGS OF FACT AND RECOMMENDATION

ROBERT KINGSLEY
3518 University Avenue
Los Angeles 7, California

EDMUND R. PURVES
1735 New York Avenue, N. W.
Washington 6, D.C.

[fol. 153]

UNITED STATES ATOMIC ENERGY COMMISSION
ADVISORY BOARD ON CONTRACT APPEALS

DOCKET No. 95

IN THE MATTER OF THE APPEAL OF

UTAH CONSTRUCTION COMPANY
Under Contract No. AT(10-1)-645

FINDINGS OF FACT AND RECOMMENDATION

JURISDICTION

The present appeal was taken by the Contractor, the Utah Construction Company, 100 Bush Street, San Francisco, California, prime Contractor under Contract No. AT(10-1)-645, for the Atomic Energy Commission, from a decision dated October 27, 1955, by the Manager of the Idaho Operations Office, Contracting Officer of the United States Atomic Energy Commission, Idaho Falls, Idaho.

The decision of the Contracting Officer was received by the Contractor on October 29, 1955; the notice of appeal was dated November 3, 1955, and was received by the Contracting Officer on November 7, 1955. The appeal was from a decision by the Contracting Officer that held extra work and delays were not incurred by reason of the fact that the Architect-Engineer had incorporated certain notes on vendor's shop drawings. These notes were claimed by the Contractor to constitute design data calling for additional work. The claim was based on Article 3 of the Contract, which reads:

"ARTICLE 3. *Changes*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due, under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall

be modified in writing accordingly. * * * Any claim [fol. 154] for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided*, however, that the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representatives, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

Article 15 of the General Provisions of the prime contract provides:

"ARTICLE 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representatives, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

The appeal was within time and the jurisdiction of the Advisory Board on Contract Appeals, United States Atomic Energy Commission, is clear.

For purposes of simplification in these Findings of Fact and Recommendations, the term "Utah" shall designate the Contractor, the Utah Construction Company; the term "Standard" shall designate Utah's subcontractor, Standard Steel Corporation; and "Parsons" shall designate the Ralph M. Parsons Company, the Architect-Engineer for the above work.

PROCEDURE

I

The matter was heard at the School of Law, University of Southern California, on May 21, 1956. The hearing was commenced at 10:00 A.M. and proceeded throughout that day, adjourning at 5:00 P.M.

Peter Jacobsen, Esquire, 100 Bush Street, San Francisco, California, and Gardiner Johnson, Esquire, 111 Sutter Street, San Francisco, California, appeared on behalf of [fol. 155] half of Utah. Wilber Rowberry, Esquire, Attorney of Idaho Falls, Idaho, appeared on behalf of the Atomic Energy Commission. Edmund R. Purves acted as Chairman of the panel of the Board.

Due to a misunderstanding no reporter was present. It was therefore agreed, in the interest of time and due to the difficulties in reassembling all parties, including the members of the panel, that the hearing would be conducted without a reporter and that the briefs and exhibits would constitute the record.

The members of the panel had reviewed the installation on the site during the proceeding November and were familiar with the physical conditions of the finished structure and those items concerned in this dispute.

II

At the hearing, counsel for the Contracting Officer objected to the receipt in evidence of some of the documents included in the appeal record, compiled and transmitted by the Contracting Officer pursuant to Rule 3.13 of the Rules of Procedure governing appeals to this Board. The Board referred to its customary practice with reference to documents contained in the appeal record (subsequently stated formally in the Board's opinion in Appeal of Otis Williams and Company, Docket No. 88.) The Board ruled at the hearing that the inclusion of documents in the appeal record was tantamount to an offer into evidence by the Government and that only the Contractor could object at the hearing to their receipt.

On further reflection, the Board has concluded that this ruling was too broad. Rule 3.13 requires the Contracting Officer to include "... three copies of all correspondence, and other data relevant to the dispute." While [fol. 156] the punctuation is poor, we regard the words "relevant to the dispute" as modifying both "correspondence" and "other data."

It follows that inclusion of a document in the record compiled under Rule 3.13 is a representation by the Contracting Officer of relevancy and such representation is binding on him at the hearings. But, since relevancy is the *only* limitation on the Rule's otherwise all-inclusive direction, the Contracting Officer should be free to raise any other proper objection to the receipt of included material.

In the light of the Board's ultimate recommendation on this appeal, the error was not prejudicial to the Contracting Officer and we make no attempt now to revise the ruling as to the specific documents concerned.

BACKGROUND

The Utah Construction Company, prime Contractor, entered into a contract with the Atomic Energy Commission on the 19th of March, 1953, for the construction of the Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project, USAEC National Reactor Testing Station, Idaho. The contract, among other things, called for the furnishing and installation of the machinery and equipment necessary to operate two enormous shield doors of such dimensions and weight as require mechanical operation, it being obvious that the housing for the machinery and equipment would have to be adequate and appropriate. The present appeal concerns specifically the final location and refinement of design of certain machinery and other equipment necessary to operate shield doors No. 101 and No. 301.

The location of the foregoing machinery and equipment was roughly or vaguely indicated on the bidding documents. Subsequently the location was accurately shown in the proper location on the vendor's shop drawings.

[fol. 157] One of the bidding documents prepared by the Ralph M. Parsons Company, Architect-Engineers, Drawing No. 902-3-ANP-MS-225 entitled "Assembly and Maintenance Bldg. 607—Hot Shop—door 101—Cable and Sheave System," showed on a plan details of a "Motor and Speed Reducer." The companion Drawing No. 902-3-ANP-607-MS-227—Cable and Sheave System for Door 301, did not indicate the corresponding location of the Motor and Speed Reducer. These drawings are dated December 13, 1952. A note on the drawings refers the bidder to the specifications. The specifications are adequate, judging by customary practice. The specifications give accurate and complete descriptions of the necessary machinery and equipment. The machinery and equipment are, however, only sketchily indicated on the drawings and the original indications of location turned out to be erroneous in that the machinery and equipment could not have been installed in the positions roughly indicated on the drawings. Thus, although Utah was furnished with definitive information with respect to the equipment itself, it was given sketchy information with respect to the locations for specific installation and that sketchy information was fundamentally erroneous with respect to position.

During September, 1953, Utah's subcontractor, Standard Steel Corporation, submitted for approval its drawings No. 5325/C1-0 and 5325/C2-0, being the drive details for doors 101 and 301. It was on these drawings that Parsons made the corrections which relocated the positions of motors and reducers as originally indicated on the contract documents. In addition Parsons made necessary corrections to elevation details as the contract documents failed to depict accurately such obviously essential items as machinery pads and bolts. There were further notes on these drawings which called for the lowering of the motors to adequate bedding and even notes calling for the provision of bed and pillow block [fol. 158] supports necessary to take the imposed loads. That the contract documents were woefully deficient in affording adequate information for the housing and position of equipment was obvious. However, there is no question but that the specifications gave the Contractor an

accurate description of what he would be called upon to furnish and install, in the way of equipment. Standard subsequently furnished Drawing No. 5325/C2-0, in October, 1953, which shows the motor and reducer correctly relocated.

Downs Crane & Hoist Company, through Standard, submitted Drawing No. 810610, the shop drawing for the cable drive drums for the shield doors. Parsons made notes on these drawings calling for the grooving to be the full length on the drum assembly and noting that No. 40 carbon steel should be used for the gear teeth. Parsons made the corrections on the shop drawing.

DISCUSSION

An immediate question occurring to the Board from the evidence presented is why, if Parsons had the knowledge to show correctly the location of the machinery and equipment on Standard's shop drawings, did Parsons not exercise that same knowledge and skill on the bidding documents, and thus have avoided any misunderstanding and subsequent controversy.

There is no question but that the bidding documents with respect to the immediate problem were inadequate, although the specifications did indicate to the Contractor in sufficient detail the nature of the equipment it would have to house.

In submitting a firm bid on the bidding documents, Utah certainly gave assurance to the Government that it was satisfied with the adequacy of the contract documents. [fol. 159] In as important an item as the operating equipment for the tremendous doors (of sufficient height and width to permit entry of railroad cars and sufficient thickness and design to prevent the passage of radiation) the Government might well assume that Utah was in full possession of all facts necessary to enable it to submit a firm bid.

It is possible that Parsons, which was aware of its own deficiency in failing to produce a complete bidding document, was counting on correcting its services on shop drawings to be submitted subsequently. This is, however, not a recommended way for professional architects or

engineers to render services. The responsibility of adequate design was clearly that of Parsons and not of Utah. We are, however, concerned primarily as to whether or not the notations on the shop drawings made by Parsons did constitute an amendment to the original plans and specifications. The notes on Standard's drawings have to do with location and not with equipment.

I

Insofar as the appeal relates to the location or relocation of the machinery and equipment, the Board concludes that no "change," within the contemplation of Article 3, was involved.

Certainly, a contract should not be entered into which depends on the submission of, and dependence on, corrections or notations on shop drawings. It is generally assumed in the construction industry that bidding documents are comprehensive and conclusive. However, when a contractor submits a firm bid, the bid is based upon documents which the owner must assume are comprehensive and conclusive, otherwise the contractor would have raised objections. By the same token, a contractor should not submit a firm bid on documents which he questions as to completeness and adequacy. The Board [fol. 160] can only assume in this instance that Utah was satisfied with the bidding documents presented to it. When those documents proved to be incomplete, it was Utah's responsibility to supply the omitted details, and secure approval thereof from the Architect-Engineer. Since Utah did not do this, it cannot complain that Parsons did so. It must be noted that Utah, so far as appears, never suggested any alternative method of meeting an obvious need in connection with the location problem.

II

As above indicated, Parsons also, by notations on shop drawings, required grooving of the drums for their full length and imposed a specific carbon content for the steel used in the gear teeth. The Board is unable to find any

basis for these demands in the bidding documents; and, since they are not the sort of obvious need involved in the location issue, we regard them as "changes" within the meaning of Article 3.

The Government argues that, even if these were "changes," the appeal cannot be allowed (a) because the notations on the shop drawings, even if sufficiently "in writing," were not orders of the Contracting Officer, and (b) because the claim, not made until January 28, 1955, was, by over a year, too late in the light of the 10-day requirement of Article 3.

(1) The Board has had numerous occasions to consider the effect of the 10-day requirement in various contract clauses. We have held, consistently, that the Contracting Officer's discretion, under the final proviso of such articles, is not arbitrary but reviewable under the disputes clause. However, each case must stand on its own facts. In general it is true, as the Board has said in other opinions, that the primary purpose of early notice is to afford the Contracting Officer an opportunity to ascertain the facts while they are fresh, and that, therefore, if the facts can still be determined, a late claim should be de-[fol. 161] cided on its merits. However, we have recognized an additional purpose in early filing of claims under the "Changed Condition" article—namely an opportunity to mitigate damage by deletion of, or changes in, the work required. On further reflection, we think the same principle is applicable to the "changes" article. Promptly advised that relief under this article will be sought, the Contracting Officer might well elect to rescind the order or to modify it. We do not, as we did not in connection with the "changed condition" article, foreclose the possibility that a case may arise where the Contracting Officer is on notice of a potential claim apart from a formal demand, or that a case might exist where the change obviously would have been ordered regardless of potential expense. But the present case seems to us to be one where the general rule and not some possible exception applies. The claim was too late and is barred.

(2) Our conclusion as to the effect of late filing makes it unnecessary for us to decide the issue—argued ex-

tensively in the briefs—as to whether or not an order of the Architect-Engineer can ever be regarded as the equivalent of a change order issued by the Contracting Officer. We expressly leave that issue open for a more appropriate case.

III

The Contractor contends, also, that it was caused serious delays, entitling it to an extension of time under Article 9 of the contract. While that article also contains a 10-day limit on filing claims, the situation is different from that under other articles with similar clauses. Of necessity, the delays complained of will always have occurred before a claim is made and the only purpose of early filing, therefore, is to insure an accurate factual determination. We think those facts can, in this case, still be determined.

[fol. 162] While the Contracting Officer's decision, here appealed from, denied "any and all relief" he does not refer to the claim for time extension and, indeed, seems to have overlooked the references thereto in the Contractor's letters. Under the circumstances, the Board feels that the matter should be remanded to him for the making of the specific findings of fact, on this issue, contemplated by Rule 3.10 (see Dockets No. 91 and 96 relating to this same Contractor and the same contract), and for the entry of a proper decision thereon.

FINDINGS OF FACT

1. Under date of March 19, 1953, the United States Atomic Energy Commission and the Utah Construction Company entered into Contract No. AT(10-1)-645, under which Utah undertook for a fixed price to construct the Assembly and Maintenance area and Administration area at the Aircraft Nuclear Propulsion Project, USAEC National Reactor Testing Station, Butte and Jefferson Counties, Idaho;

2. The contract called for the furnishing and installation of certain machinery and equipment necessary to operate doors 101 and 301;

3. The specifications described definitively and adequately the machinery and equipment necessary;

4. The drawings concerned with the subject failed to convey adequately to the Contractor the location, position and supporting details of the machinery and equipment necessary to operate the doors;

5. The shop drawings of the vendor to the General Contractor were corrected by notations made by the Architect-Engineer to give definite information with respect to the location of the machinery and equipment;

6. Utah had submitted a firm bid on the basis of the documents furnished to it and the Government was entitled to expect a satisfactory and complete job;

[fol. 163] 7. The notations referred to in Finding No. 5 and the actions of the Contractor pursuant thereto did not constitute "changes" within the meaning of Article 3 of the contract;

8. The Architect-Engineer also required, by notations on shop drawings, additional grooving on the cable drums and a particular carbon content in gear teeth;

9. The matters referred to in the Finding No. 8 were "changes" within the meaning of said Article 3;

10. Claim for adjustment of the changes referred to in Finding No. 9 was not made within the time specified in the contract and the refusal of the Contracting Officer to consider a late claim was proper;

11. Sundry acts of the Government are claimed to have entitled the Contractor to an extension of time under Article 9 of the contract; but the Contracting Officer has not made specific (or any) Findings of Fact as to such issue as required by Rule 3.10 of the Board's Rules of Procedure.

RECOMMENDATION

The Board recommends;

(1) That the appeal be denied as to all matters except the claim for a time extension; and

(2) That the matter be remanded to the Contracting Officer for the making of specific Findings of Fact as to

the claim for a time extension, and the issuance of a proper decision thereon, which decision shall be subject to a further appeal if desired.

Dated: April 25, 1957

ADVISORY BOARD ON CONTRACT APPEALS

/s/ EDMUND R. PURVES
EDMUND R. PURVES, Member

/s/ ROBERT KINGSLEY
ROBERT KINGSLEY, Member

138

[fol. 164]

UNITED STATES ATOMIC ENERGY COMMISSION
P.O. Box 1221
IDAHO FALLS, IDAHO

In Reply Refer To:

OC:WLR

October 27, 1955

Utah Construction Company
142 East 3rd South Street
Salt Lake City 10, Utah

Attention: Mr. W. J. Pollin

Subject: Shield Doors—Contract No. AT(10-1)-645

Gentlemen:

There has been presented to me for decision as Contracting Officer under Contract AT(10-1)-645, your claim for alleged extra work in connection with the shield doors installed in Building 607 under subject contract.

The record reveals that this claim was first presented to the Commission on January 28, 1955, in the form of a proposal for a change order for alleged extra work beyond the scope of the contract. The Contractor alleges that this extra work was brought about by the action of the Architect Engineer for subject contract incorporating additional design through correction of your vendor's shop drawings. By letter of March 2, 1955, the Commission allowed two and denied the remainder of the items composing your claim. By letter of October 6, 1955, the Contractor requested a review of its position on the remainder of the claim, presenting additional comments regarding each item and proposing that a change order be issued containing an adjustment of time and compensation for the alleged items of extra work.

AIR MAIL—SPECIAL DELIVERY
REGISTERED—RETURN RECEIPT REQUESTED

In making a decision relative to your claim the following two articles of the contract are pertinent:

"Article 3. Changes.—The contracting officer may at any time, by a written order, . . . make changes in the drawings and/or specifications of this contract [fol. 165] and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: . . ."

"Article 5. Extras.—Except as otherwise herein provided no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order."

Assuming, only for the purpose of discussion, that the contract drawing corrections made by the Architect Engineer had, in fact, effected changes in or additions to the contract drawings or specifications (and this contention we deny), it is clear from subject contract that the Architect Engineer would have had no authority to order or authorize extra work or changes on behalf of the Commission.

The above-quoted articles make it clear that only the Contracting Officer can order extra work or a change in contract drawings or specifications. Article 5. is explicit that no charge will be allowed for extra work unless ordered in writing by the Contracting Officer and the price stated in such order. Article 3. only provides for an adjustment for changes ordered in writing by the Contracting Officer and even then any claim for adjustment must be made within ten days from the date the change is ordered.

The Architect Engineer's authority is limited to checking, approving or requiring revision of shop drawings to assure conformity with approved design and contract draw-

ings and specifications. The Contractor is not required or authorized to comply with the Architect Engineer's corrections of shop drawings which would change or add to the contract drawings or specifications without written direction to do so from the Contracting Officer. It is the function of the Architect Engineer to correct shop drawings to the extent deemed necessary to make the shop drawings (which serve to implement the contract drawings and specifications by detail) comply with the contract drawings and specifications. To the extent the Contractor deemed the corrections to go beyond this, the Contractor should have refused to comply with the corrections until some agreement was reached with the Contracting Officer concerning the adjustment to be made for complying with the correction considered by the Contractor to be a change or addition entitling it to an adjustment. Lacking any such agreement, the Contractor should have refused to comply unless such correction was ordered in writing by the Contracting Officer (which order would in this case have reserved the question of adjustment pending the submission under the Disputes Clause of the question whether such correction did, in fact, constitute such a change or addition).

[fol. 166] The fact that over a year elapsed between the time these corrected drawings were submitted to the Contractor and the Contractor first brought these corrections to the attention of the Contracting Officer in the form of a claim is indicative that the Contractor considered such corrections to be within the scope of the contract drawings and specifications. However, be this as it may, even had a change or extra work been properly ordered by the Contracting Officer, the lapse of over a year prior to the submission of a claim for equitable adjustment would, of itself, preclude your right to such an adjustment. It is true that Article 3. would, upon a proper showing and determination, allow the Contracting Officer to receive and consider and, with the approval of the head of the Department, adjust any change asserted prior to the date of final settlement of the contract. It is my conclusion, however, that the facts in this instance

do not justify the waiver of the ten-day period prescribed by Article 3.

The fact that none of the alleged changes or extra work was ordered in writing by the Contracting Officer and the fact that the Contractor waited for over a year to first draw these circumstances to the attention of the Contracting Officer and make a claim for adjustment requires me to conclude, and I so find, that Utah is not entitled to any adjustment for the alleged changes or extra work performed in conjunction with the shield door installation in Building 607 under subject contract, and any and all relief requested is hereby denied.

In addition to the above findings, I also find that none of the corrections of shop drawings identified by the Contractor resulted in any change in, or work additional to that required by, the contract drawings or specifications.

This decision is to be regarded as final for the purposes of appeal under the Disputes Article of subject contract. A copy of the appeals procedure is enclosed herewith for your guidance should you wish to appeal the decision to the U. S. Atomic Energy Commission Advisory Board of Contract Appeals.

Very truly yours,

ALLAN C. JOHNSON, Manager
Idaho Operations Office
Contracting Officer

Enclosure:

1. Rules of Procedure, USAEC
Advisory Board of Contract Appeals

CC: Mr. Peter Jacobsen, General Counsel
Utah Construction Company
100 Bush Street
San Francisco 4, California (w/o encl)

[fol. 167]

IN THE UNITED STATES COURT OF CLAIMS

No. 3-61

. . . .

UTAH CONSTRUCTION AND MINING COMPANY

v.

THE UNITED STATES

Gardiner Johnson for plaintiff. *Thomas E. Stanton, Jr.*,
and *Charles J. Heyler* of counsel.

Irving Jaffe, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *James F. Merow* was on the briefs.

Before *COWEN, Chief Judge*, *DURFEE, DAVIS*, and
COLLINS, Judges, and *WHITAKER, Senior Judge*.

OPINION ON DEFENDANT'S REQUEST FOR REVIEW OF
COMMISSIONER'S ORDER—December 11, 1964

WHITAKER, Senior Judge, delivered the opinion of the court:

Plaintiff had a contract with the Atomic Energy Commission for the construction of an assembly and maintenance area at the National Reactor Testing Station in Jefferson and Butte Counties, Idaho. The contract was fully performed on January 7, 1955, several extensions of time having been granted on account of delays for which the contractor was not responsible. During the performance of the contract and after its completion, plaintiff made various claims for increased costs and for damages, some of which were claims arising under the contract and some for alleged breaches of contract by the defendant on account of delays and other causes.

[fol. 168] The case was referred to Trial Commissioner C. Murray Bernhardt for the taking of testimony and for

a report. On February 18, 1964, the commissioner issued an order defining the scope of the testimony to be taken with reference to the several claims, in the light of the Supreme Court's opinion in *United States v. Bianchi*, 373 U.S. 709 (1963). The defendant now asks us to review this order.

Prior to *United States v. Wunderlich*, 342 U.S. 98 (1951), this court had held that in determining whether or not the action of the contracting officer or the head of the department was arbitrary or capricious or unsupported by substantial evidence or otherwise contrary to law, it was not confined to the evidence before the Board of Contract Appeals (which in most cases was the representative of the head of the department), but was entitled to receive evidence *de novo*. However, the Supreme Court in *United States v. Wunderlich*, *supra*, held that we were bound by the action of the contracting officer on claims arising under the contract unless his action was fraudulent; that is to say, unless it amounted to conscious wrongdoing. Following this decision, the Congress enacted what is known as the Wunderlich Act, being the Act of May 11, 1954, 68 Stat. 81. This act in substance provided that the decision of the head of a department or his duly authorized representative or board "in a dispute involving a question arising under such contract * * * shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Following the enactment of this statute, this court first held in *Wagner Whirler and Derrick Corp. v. United States*, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954), that the Wunderlich Act was designed to restore the *status quo ante* the decision of the Supreme Court in *United States v. Wunderlich*, *supra*, but we did not decide in that case whether or not *de novo* evidence was admissible to determine whether the action of the board was arbitrary, etc. However, in *Volentine and Littleton v. United States*, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956), we explicitly held that since the purpose of Congress was to restore the *status quo ante* and since the practice prior to the

Wunderlich decision had been to receive evidence *de novo*, [fol. 169] we would continue to do so. We reiterated this position in *Bianchi v. United States*, 144 Ct. Cl. 500, 169 F.Supp. 514 (1959), 157 Ct. Cl. 432 (1962); but the Supreme Court reversed and held that in the determination of this question we were confined to the evidence admitted before the board. *United States v. Bianchi*, 373 U.S. 709 (1963).

In cases where the administrative record was defective or inadequate, the Court had this to say:

* * * *First*, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second*, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co. v. United States*, 363 U.S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court. [373 U.S. 709, 717-18.]

Where the dispute "arises under the contract" the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc. v.*

United States, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin v. United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Co. v. United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States v. Beutlas, et al.*, 324 U.S. 768 (1944). If they undertake to do so—which they rarely do—neither their decision nor the findings of fact with reference thereto have any binding [fol. 170] effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882); *Coyle v. Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F.Supp. 109, 111 (S.D.N.Y. 1941).

Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to "disputes concerning questions of fact *arising under this contract*." This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.

The Supreme Court's opinion in *Bianchi, supra*, restricting the evidence to be considered by this court to the record before the Appeals Board, is expressly limited to "matters within the scope of the disputes clause." At page 714 the Court said:

Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. * * *

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to

a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.

Finally, in conclusion, the Court said:

* * * We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to [fol. 171] review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence. * * * [373 U.S. 709, 718.]

The opinion of the Supreme Court was thus restricted to "matters within the scope of the disputes clause." An action for breach of contract is not within the scope of this clause.

However, it may be that the contracting officer and the head of the department may find a fact relevant to the settlement of a dispute arising under the contract, which fact may also be relevant on the question of the right of the plaintiff to recover for breach of contract. What effect is to be given to such a finding?

Let it be noted that no statute gives the contracting officer and the head of the department, or his representative, authority to decide the rights of the parties to a Government contract; their authority is derived solely from the contract between the parties. *Langevin v. United States, supra*, at 30.

The contract in Article 15 provides that "all disputes concerning questions of fact *arising under this contract* shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto." (Emphasis added.) Thus, the board's authority is limited to disputes "concerning questions of fact *arising under this contract*." It is only such disputes which the contracting officer and the head of the department have jurisdiction to resolve and on which their findings of fact are final and conclusive. The par-

ties did not contract that *their findings of fact should be conclusive in suits for breach of contract*. In such suits the contract does not bind a judicial tribunal to accept their findings, although they may have been relevant to a dispute "arising under the contract."

Had plaintiff been permitted to submit the dispute over what it was claiming to a judicial tribunal established by Congress with authority to find the facts and decide the dispute, and it had done so, plaintiff, under the doctrine of collateral estoppel, would have been bound by the tribunal's findings, both in the cause of action submitted and in a later proceeding between the same parties on a [fol. 172] different cause of action. *Commissioner v. Sunnen*, 333 U.S. 591 (1948). The reason for this rule is to save the time of the courts and to protect a litigant from having to relitigate an issue previously submitted to a judicial tribunal and decided by it.

But neither the contracting officer nor the head of the department, or his representative, is a judicial tribunal created by Act of Congress; they derive their authority solely from the contract between the parties, and their authority is limited by the terms of the contract. That contract authorizes them to make findings and to decide disputes "arising under the contract." It is only as to such disputes that their findings and decisions are made final and conclusive. It does not make them final and conclusive on a dispute over whether there has been a breach of the contract.

When a party submits his case to a judicial tribunal, he does so in light of the rule that its findings of fact are binding on him, not only in that litigation, but in all other litigation between the same parties. But this rule does not apply where a contract requires him to submit his claim, not to a judicial tribunal, but to a person designated by the contract; in such case he does so subject only to the terms of the contract, and the effect of the findings and decision of the designated person is that set out in the contract and no more.

So, when a party appeals to a judicial tribunal to determine whether the other party has breached the contract, it is not bound by a finding of a person only authorized

to decide disputes "arising under the contract," and it is entitled to ask the judicial tribunal to make its own findings and render its decision based on those findings. Since this is the first time that recourse has been had to a judicial tribunal, that tribunal not only may, but it is obligated, to make its own findings. Never before has the contractor "had his day in court."

For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days, but his only recourse is an appeal to the head of the department [fol. 173] whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter, so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute "arising under the contract." It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

In any case we would so construe the contract between the parties, but in this case there is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to agree to accept the con-

tract drawn by the Government; indeed, the advertisement for bids so stipulates. These contracts all contain this "disputes" clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employee, and whose prime duty is to be diligent in the protection of the Government's interests and to require that the contractor strictly comply with the terms of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult. An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms. See *Langevin v. United States*, [fol. 174] *supra*; *B-W Construction Co. v. United States*, *supra*; and *Miller, Inc. v. United States*, *supra*.

The Atomic Energy Commission's Advisory Board of Contract Appeals in the *Appeal of Utah Construction Company* (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:

It is clear, in the light of the Board's decision in *Appeal of Claremont Construction Company* (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter "relating to" and not one "arising under" the contract. The Board has discussed this distinction at length in both that *Claremont* case and in *Appeal of Frontier Drilling Company* (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.

In conclusion, we hold that in a suit for breach of contract we are not bound by a finding of fact of the Board of Contract Appeals even though that finding is relevant to "a dispute arising under the contract."

With these general principles in mind, we proceed to consider the commissioner's order with respect to the several claims. The commissioner divides them into these six categories, (1) with respect to the pier drilling, (2) the concrete aggregate, (3) the shield windows, (4) the shield door, (5) the Amercoat paint, and finally, the delay damages claim.

1. *Pier Drilling Claim.*

Plaintiff claims that in the drilling and excavation for "piers," or foundation shafts for certain buildings, it encountered subsurface conditions differing materially from those indicated in the contract documents. First, it claimed additional compensation for the extra cost of drilling the "float rock" which it had encountered and which it claimed was not shown on the contract documents. This claim was denied by the contracting officer on the ground that no changed conditions had been encountered. The Advisory Board of Contract Appeals, the representative of the head of the Atomic Energy Commission, reversed and found that the float rock did constitute a changed condition but that no additional cost had been [fol. 175] incurred by plaintiff thereby unless it was liable therefor to its drilling subcontractor. The claim was remanded to the contracting officer to determine the amount of the increased cost of drilling.

Certain letters have been filed with the commissioner to indicate that plaintiff did not further prosecute its claim for increased cost and, hence, neither the contracting officer nor the board allowed plaintiff any sum therefor.

The commissioner holds plaintiff is not entitled to recover in this court therefor by reason of failure to exhaust its administrative remedy. The commissioner was correct in affirming the action of the board since this question was a dispute "arising under the contract."

Plaintiff also claims damages for delay by reason of the refusal of the contracting officer to modify the contract on account of the changed conditions encountered. Since this is an action for breach of contract, the parties are not bound by the decision of the board and may introduce evidence *de novo* concerning any unreasonable delay that may have been occasioned thereby.

In *United States v. Rice*, 317 U.S. 61 (1942), it was held that, where a contract was modified on account of changed conditions encountered, the contractor was entitled to increased costs and an extension of time, but not to damages incident to the delay. However, where the contracting officer delays unreasonably in modifying the contract, the contractor is entitled to recover damages for such part of the delay as was unreasonable. *McGraw & Co. v. United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394 (1955), and cases cited. Here the contract was not modified until after completion of the work.

It is not apparent how this could have delayed plaintiff because plaintiff has failed to show that the changed conditions increased its costs, but if it was unreasonably delayed, plaintiff is entitled to recover for breach of contract.

2. Concrete Aggregate Claim.

The contract allowed the contracting officer to purchase concrete aggregate from the Government's supplies and the contractor did so. Early in the performance of the contract it was discovered that the concrete did not have [fol. 176] the required strength and that the dirty condition of the aggregate was responsible therefor. To supply the necessary strength, the contracting officer required plaintiff to add one sack of cement to each cubic yard of concrete mix during the time the Government was washing the concrete so as to bring it up to specification requirements. Plaintiff submitted to the contracting officer a claim for the extra cement used and was reimbursed therefor.

More than a year after the contract had been completed, plaintiff filed a claim for additional costs incurred because of the poor condition of the aggregate. The contracting officer was of the opinion that this additional claim of the plaintiff was one for breach of contract and, therefore, one which he had no authority to decide under the terms of the "disputes" article. He also thought the claim was untimely.

Plaintiff appealed to the head of the department. The Advisory Board of Contract Appeals dismissed the claim

for failure of the plaintiff to make timely presentation of it.

If this claim be one for breach of contract, as our commissioner supposes, we have jurisdiction to determine it and to receive evidence *de novo*.

However, assuming the claim is not for breach of contract, we cannot agree with the commissioner that the failure of the board to consider the case on its merits gives plaintiff the right to introduce evidence *de novo* in this court. If we decide the board should have considered the claim on its merits, we should suggest to the board that it consider it on the merits and suspend proceedings here until it has had a reasonable opportunity to do so.

3. *Shield Windows Claim.*

Under the original contract defendant undertook to furnish the shield windows to be installed in the building to be constructed, but by modifications 2 and 4 thereof, plaintiff was required to negotiate a contract with the Corning Glass Works for the procurement of these shield windows, which it did.¹ The windows were supposed to comply with contract specifications and with the shop drawings and samples. Plaintiff complains that defendant unreasonably delayed in approving the shop draw-[fol. 177] ings. It also says that the designated authority first approved the type II windows but that other agents of the defendant later rejected them and still later the defendant reversed its rejection and again approved them. It also alleges delay in connection with the approval of type I windows.

The plaintiff presented its claim on this item for a time extension for excusable delay and an equitable adjustment for increased costs under the Changed Conditions article of the contract. The commissioner states that he cannot determine from the record what part of the claim arises under the contract and what part of it is for damages for

¹ These shield windows were designed to permit observation of what was going on within the atomic reactor without subjecting the observer to radioactive radiation.

delay; but he concludes that the basic issue is whether or not the plaintiff was unreasonably delayed by acts of the Government. As to such claim he properly says that the decision of the head of the department is not final and *de novo* evidence may be introduced in this court.

Defendant's contention that the filing of the claim for delay with the contracting officer under the Changed Conditions article forecloses plaintiff from bringing suit for damages for delay cannot be sustained. The contracting officer could only grant an extension of time for delay (*United States v. Rice, supra*); he could not award damages for unreasonable delay.

It appears that the board over a period of 3 days heard testimony with respect to this claim, including the claim for delays, and that the transcript of this testimony runs to 453 pages, and that many exhibits were filed; hence, the commissioner suggests that the parties might well agree to stand on this record, with permission to supplement it with respect to the delay claim to such extent as they think proper. Certainly the parties ought to desist from duplicating the administrative record but, insofar as the claim relates to damages for unreasonable delay, the parties are not foreclosed by it nor from supplementing it, if they wish.

4. *Shield Door Claim.*

This claim was presented under the Changes article of the contract under which the contractor asked for extra costs by reason of a change in the drawings and specifications. The contracting officer disallowed the claim because [fol. 178] cause it was not presented within 10 days as required by Article 3 of the contract.

After completion of the work, final payment was made to the contractor and a release was signed by it from which it excepted certain claims, including this shield door claim. According to defendant's answer, which is not rebutted by plaintiff, it released the Government "from all claims arising under, in connection with or by virtue of the subject contract and all modifications thereto with the exception of the shield window claim, the pier drilling claim, and the shield door claim, the concrete

aggregate claim, and the sum of \$5,606.39 which was withheld pending a decision in the Amercoat appeal." The claim presented to the contracting officer with respect to the shield door did not advance any claim for increased costs on account of delays. If the release signed by plaintiff reads as set out in the Government's answer, it must be said that the Government was thereby released from all claims not specifically excepted, whether arising under the contract or in breach of the contract. *United States v. William Cramp & Sons*, 206 U.S. 118 (1907); *Watts Construction Co. v. United States*, Ct. Cl. No. 351-61, decided May 10, 1963. The exception of "the shield door claim" must have referred to the claim presented to the contracting officer. As stated, that claim did not refer to damages for delay. Hence, the commissioner is correct in saying that any evidence with reference to damages for delay on account of the shield door is inadmissible, because foreclosed by the release.

As to the claim made for extra work on account of changes made in the shop drawings, this is a claim "arising under the contract" and was within the authority of the contracting officer to determine. The contracting officer disallowed the claim because it was not presented within 10 days as required by Article 3 of the contract. The board held that a part of plaintiff's claim for extra costs must be disallowed because it did not constitute changes under the Changes article, and as to that part which did constitute changes the board held that it was barred by the failure of the plaintiff to present its claim within the 10-day period. These decisions, both of the contracting officer and of the board, were within their province. There is no allegation of arbitrary and capricious action and, hence, we have no jurisdiction to review the action of the board. It is, therefore, immaterial for the purposes of this motion that no record was made of the board's proceedings.

5. *The Amercoat Paint Claim.*

In the release signed by the plaintiff, according to the defendant's answer, it "excepted therefrom the sum of \$5,606.39 which was withheld pending a decision in the

Amercoat appeal." This sum was subsequently paid plaintiff and, therefore, defendant has been relieved from all liability with respect to this Amercoat paint claim.

The commissioner's order of February 18, 1964, is amended accordingly.

Defendant's motion for partial summary judgment may be filed, but the same is overruled with leave to renew as to any matters contained therein not ruled upon in this opinion.

COWEN, *Chief Judge*, concurring in the result:

I concur with the majority and Judge Davis in rejecting the Government's sweeping contention that *de novo* evidence is inappropriate with respect to any factual question connected with the contract, regardless of the nature of the contractor's claim or the authority of the agency board or head of the department to decide the dispute to which such factual questions are related. For the reasons stated in both opinions, defendant's position, that the Disputes clause requires the administrative agency to make binding factual determinations on every question relating to the contract, is untenable.

It should be emphasized that we have before us only the review of a commissioner's order. Considering the stage in the trial at which the order was issued, the nature of the record before us, and the briefs of the parties, I do not believe that this case in its present posture presents the proper vehicle for laying down hard and fast rules to resolve all of the important issues urged upon us by the parties. As I understand, the major issue, which separates the views of the majority from those of Judge Davis, is the extent to which a finding made by an agency board on a claim for relief that can be granted under the terms of the contract will be binding in a subsequent court action for relief of the type which is not available under the terms of the contract, when the same factual question is again presented. I would reserve my decision until the facts and questions of law are adequately presented to the court at a stage in the proceedings where it can properly decide the matter.

I would also reserve decision as to the scope and effect of the Suspension of Work clause that was included in the contract in this case. Apparently both the contractor and the AEC Advisory Board on Contract Appeals considered that this clause has no application to any of the claims presented by the contractor. However, defendant argues that the Suspension of Work clause authorizes the contracting officer to pay the costs incurred by the contractor as a result of Government delays. A decision as to the application of that clause might have an important bearing on other questions to be decided in this case. However, as Judge Davis has pointed out, this case does not present that issue in its present posture.

With the foregoing preliminary statement, I concur in the result reached by the majority on the six claims covered by the trial commissioner's order.

DAVIS, *Judge*, concurring in part and dissenting in part:

1. I concur with the court in rejecting the Government's broad contention that the Disputes clause demands that *all* factual matters connected with the contract—whatever the nature of the claim—be tried and determined only by the agency board (or representative), with finality attaching to all those administrative factual findings which are adequately supported. That has never been the law during the long history of Disputes clauses. On the contrary, the finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions "arising under" the contract. Exhaustion of the administrative remedy has not been required and finality has not been accorded where the facts relate to a type of claim, such as for a breach, [fol. 181] which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board can give no relief under the contract, and therefore cannot finally decide the facts.

This was the accepted distinction before the Wunderlich Act of 1954, 68 Stat. 81, 41 U.S.C. §§ 321-22.¹ There is certainly no ground for saying that that enactment changed this segment of Government contract law. The same rules have continued to be followed since the passage of that statute, both by the administrative agencies and by this court, explicitly and tacitly.² As the court's

¹ See *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629-30 (1937); *Plato v. United States*, 86 Ct. Cl. 665, 677-78 (1938); *Langvin v. United States*, 100 Ct. Cl. 15, 29-31 (1943); *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54, 80-81 (1944); *Beuttas v. United States*, 101 Ct. Cl. 748, 767 ff, 771 (1944), *rev'd on other grounds*, 324 U.S. 768 (1945); *Holton, Seelye & Co. v. United States*, 106 Ct. Cl. 477, 500, 65 F. Supp. 903, 907 (1946); *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212 (1948); *Hyde Park Clothes, Inc. v. United States*, 114 Ct. Cl. 424, 438, 84 F. Supp. 589, 592 (1949); *John A. Johnson Contracting Corp. v. United States*, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); *Continental Illinois Nat'l Bank v. United States*, 121 Ct. Cl. 203, 246, 101 F. Supp. 755, 759, *cert. denied*, 343 U.S. 963 (1952); *Potashnick v. United States*, 123 Ct. Cl. 197, 218-20, 105 F. Supp. 837, 839 (1952); *Continental Illinois Nat'l Bank v. United States*, 126 Ct. Cl. 631, 640-41, 115 F. Supp. 892, 897 (1953).

² I give only a relatively few samples. See, e.g., *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394, 397 (1955); *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 652, 132 F. Supp. 698, 701 (1955); *Railroad Waterproofing Corp. v. United States*, 133 Ct. Cl. 911, 915-16, 137 F. Supp. 713, 715-16 (1956); *Peter Kiewit Sons Co. v. United States*, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957); *Volentine & Littleton v. United States*, 144 Ct. Cl. 723, 726, 169 F. Supp. 263, 265 (1959); *Abbett Electric Corp. v. United States*, 142 Ct. Cl. 609, 613, 162 F. Supp. 772, 774 (1958); *A. S. Schulman Electric Co. v. United States*, 145 Ct. Cl. 399 (1959); *Snyder-Lynch Motors, Inc. v. United States*, 154 Ct. Cl. 476, 519, 292 F. 2d 907 (1961); *Helene Curtis Industries, Inc. v. United States*, Ct. Cl., No. 251-56, decided Feb. 6, 1963, slip op., pp. 53-54, 312 F. 2d 774; *W. H. Edwards Eng'r Corp. v. United States*, Ct. Cl., No. 218-59, decided April 5, 1963, slip op., p. 5; *Flippin Materials Co. v. United States*, Ct. Cl., No. 8-57 decided Jan. 11, 1963, slip op., p. 48, 312 F. 2d 408; *Ekco Products Co. v. United States*, Ct. Cl., No. 464-57, decided Jan. 11, 1963, 312 F. 2d 768; *Ideker Constr. Co.*, IBCA No. 124 (1957), 57-2 B.C.A. par. 1441, pp. 4845-46; *Norair Eng'r Corp.*, ASBCA No. 3527 (1957), 57-1 B.C.A. par. 1283; *Craig Instrument Corp.*, ASBCA No. 6385 (1960), 61-1 B.C.A. par. 2875; *Kenneth Holt*, IBCA No. 279 (1961), 61-1 B.C.A. par. 3060; *Modis Eng'r & Mfg. Corp.*, ASBCA No. 7490

opinion in the present case points out, the Supreme Court's opinion in *United States v. Carlo Bianchi & Co.*, [fol. 182] 373 U.S. 709 (June 3, 1963), did not remotely suggest that these long-established rules were wrong or should be changed. That decision dealt solely with a matter conceded to be within the scope of the Disputes clause.³

With this history of almost thirty years, it is far too late to try to interpret the Disputes clause anew, as if the question had emerged for the first time. The practice is too firmly rooted to be puffed aside by grammatical refinements and hortatory appeals to the "plain language" canon. The judicial, administrative, and practical construction of the clause is too entrenched for any but the strongest of assaults. We have been presented with no such overwhelming reason for making this drastic change in Government contract law at this time.

2. I disagree, however, with the majority's holding that well-supported factual findings, appropriately made by the board in deciding a dispute "arising under the contract," are not binding in a court trial of a cause of action which is outside the Disputes clause (e.g., for breach, reformation, etc.). If the board has relevantly and appropriately decided a certain factual issue in connection with a claim under the Changes or Changed Conditions article, etc., and if that finding is adequately sustained by the administrative record, my view is that then the court should accept the finding in deciding the breach claim (or other claim not "arising under the contract"). There should be no *de novo* evidence and no *de novo* find-

(1962), 1962 B.C.A. par. 3363, p. 17,308; *Allied Contractors, Inc.*, IBCA No. 265 (1962), 1962 B.C.A. par. 3501, pp. 17,864-65. The Advisory Board on Contract Appeals of the Atomic Energy Commission took the same position (see the court's opinion, *ante*). See, also, Spector, Is it "Bianchi's Ghost"—or "Much Ado About Nothing", 16 Admin. Law Rev. 265, 290-91 (1964).

³ In the case at bar, the defendant does not rely on *Bianchi* to support its broad position. The Government's Supplementary Memorandum (p. 10) says, after quoting a sentence from the *Bianchi* opinion, 373 U.S. at 714, "Thus, *Bianchi* does not decide the scope of the standard disputes agreement in Government contracts, beyond the recognition that no argument was addressed to this question."

ing on that particular factual issue. Of course, court evidence and court findings would be entirely proper as to all factual questions, remaining in the court case, which have not been finally determined by the agency tribunal; only those particular facts which have been actually found, and which survive scrutiny under the Wunderlich Act, would be conclusive. And, of course, a board could not gratuitously exceed its mandate by wandering off and finding facts which are not a true part of, and [fol. 183] integral to, its determination under the substantive contract clause being applied.

This position, rather than the court's, seems to me required by the terms of the Disputes clause, the phrasing of the Wunderlich Act, the principle underlying the *Bianchi* decision, and the policy of collateral estoppel.⁴ Once an issue of fact arises in a controversy under the contract and is decided by the agency, the text of the Disputes clause makes that decision, if supported, final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation. The statute, too, is framed in terms of the conclusiveness, without restriction, of any supportable factual decision by the board “in a dispute involving a question arising under such contract.”⁵ The wording of both the Act and the contract clause seem to grant finality to all factual findings properly made by the board in the course of resolving a dis-

⁴ I know of no decision of this court which has addressed itself to this exact problem.

⁵ 41 U.S.C. § 321 provides: “No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit not filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.”

41 U.S.C. § 322 provides: “No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.”

puted question under the contract—not merely to the board's findings on disputed issues of fact which themselves necessarily arise under the contract.

The *Bianchi* opinion articulates the basic rationale for accepting fully the Act and the clause as they are written—avoidance of “a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end” (373 U.S. at 717). This major underpinning of the *Bianchi* decision likewise supports the finality, in court, of all facts validly found by the board in the course of a determination under the contract. There is no need for a second hearing on an issue already tried and resolved.

[fol. 184] This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In the light of *Bianchi*'s evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceedings, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 566 (1951); *Fairmont Aluminum Co. v. Commissioner*, 222 F. 2d 622, 627 (C.A. 4, 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress

and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion.

3. With respect to a *de novo* trial, my disposition of the six separate claims with which we have to deal would be as follows:

a. *Pier Drilling Claim*: The only aspect of this claim now before us, on the Government's request for review of the Commission's order, is the ruling that plaintiff can introduce *de novo* evidence on the issue of whether it was delayed into the winter (and thereby suffered damage) in the pouring of concrete. This alleged delay in pouring concrete was part of an administrative claim that plaintiff was entitled to relief, under Article 4 (Changed Conditions), for the difficulties met after it encountered "float rock." The Advisory Board could not grant monetary compensation for this delay (*United States v. Rice*, 317 U.S. 61 (1942)), but under the express words of Article 4 the Board could allow an extension of time for performance. In refusing to give that relief, the Board specifically found that the delay due to the "float rock" did not operate to delay the building construction (*i.e.*, the pouring of concrete). Since this issue was then properly before the Board in the proceeding under Article 4, its finding of fact must be accepted (in my view) if adequately supported. There should be no *de novo* trial of this issue.

b. *Concrete Aggregate Claim*: I agree with the court on this part of the case. The Hearing Examiner never reached the merits of any claim and therefore decided nothing (on the merits) which would be binding here. If the present demand can correctly be deemed one for breach of contract, there should be a full trial. But if the demand properly comes under the contract, the Commissioner should decide whether or not the Hearing Examiner's ruling on the timeliness of the appeal is to be upheld. If so, the claim is at an end. If not, proceedings here should be suspended to allow the Atomic Energy Commission a reasonable opportunity to determine the merits of the claim. Like the court, I intimate no view as to the character of the claim (breach of contract vs. arising under the contract).

c. *Shield Window Claim*: Plaintiff sought both compensation and an extension of time under Article 4 (Changed Conditions) for this item—just as with the Pier Drilling Claim. Basing its decision on Articles 4 and 9 (Delays—Damages), the Advisory Board, after a full hearing, made findings on the very delay for which plaintiff now seeks compensation. Those findings were rightly part of the Board's determination whether or not to grant an extension of time—relief expressly authorized by Articles 4 and 9. As indicated above, these findings, to the extent sanctioned by the administrative record, should be held binding on this court, and *de novo* evidence (directed at the same factual issues) disallowed. If there are other factual issues not covered by the Board's supportable findings, *de novo* evidence should be permitted.

[fol. 186] d. *Shield Door Claim*: I agree with the court that plaintiff is barred by its release from now seeking delay damages on this demand.* The claim made administratively was plainly one under the Changes article (Article 3) and therefore within the Board's competence. I do not concur, however, with the court's disposition of this claim on the ground that there is no allegation of arbitrary or capricious action. This is a formal defect which can easily be cured by amendment. If plaintiff does so amend, I would let the Commissioner decide whether he can adequately review the Board's findings in the absence of the oral testimony, *e.g.*, on the basis of the papers and documentary evidence. If such a review would be insufficient, I would suspend proceedings to give the Atomic Energy Commission a chance to correct the record by reconstructing the previous hearing or by holding a new one (see *United States v. Carlo Bianchi & Co.*,

* Technically, the question of the release is not now before us on defendant's request for review since the Commissioner decided that point in favor of defendant. Plaintiff did not seek review. In the interests of speedy and orderly disposition of the litigation, however, it seems better to dispose of the issue now, rather than when the case comes before us on the merits or on a motion for partial summary judgment. By failing to appeal from the Commissioner's ruling, plaintiff can be deemed to have accepted at least that part of his decision. There is no suggestion in the briefs that plaintiff is preserving its position on that phase of the case.

supra, 373 U.S. at 717-18).⁷ *Bianchi*, as I read it, precludes any *de novo* judicial trial where the claim is solely under the contract and there have been administrative findings on the merits.

e. *Amercoat Paint Claim*: I agree with the court. To the extent not released,⁸ this claim has been paid.

f. *Delay-Damages Claim*: The Commissioner held that, aside from the matter of the release,⁹ the plaintiff's general claim for delay damages tracked the separate individual claims and should follow their disposition. I agree with this conclusion (as presumably the court does, although the opinion does not mention this phase of the [fol. 187] case). The general delay damages claim appears to have no independent status of its own but is a recapitulation of the separate demands.

4. There are two types of *Bianchi*-related issues which this case does not present in its current posture: (a) The extent to which an administrative determination of factual questions directly related to the interpretation (rather than the application) of the contract provisions is binding in court;¹⁰ and (b) the proper procedure where the contractor, without having pursued administrative remedies under the contract, sues for a breach, while the defendant contends that the claim *could* and *should* have been framed as a demand for administrative relief under some specific clause of the contract. Since *Bianchi*, the court has not decided these questions (and does not do so now), and I continue to reserve my position until the issues must be faced. Cf. *WPC Enterprises, Inc. v. United States*, Ct. Cl., No. 256-59, decided Oct. 11, 1963, slip op., p. 7, 323 F. 2d 874, 878.

⁷ If plaintiff refuses to participate in such renewed administrative proceedings, it should be held to have abandoned the claim. If the Atomic Energy Commission refuses, "the sanction of judgment for the contractor" is available (373 U.S. at 718).

⁸ See footnote 6, *supra*.

⁹ The defense of release is raised by the defendant's motion for partial summary judgment which appears to cover more than the six claims now before us.

¹⁰ This is one aspect of the so-called "fact vs. law" question under the Wunderlich Act.

[fol. 188]

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1965

UNITED STATES, PETITIONER

vs.

UTAH CONSTRUCTION AND MINING COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—June 10, 1965

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 9th, 1965.

/s/ Earl Warren
Chief Justice of the United States

Dated this 10th day of June, 1965.

[fol. 189]

SUPREME COURT OF THE UNITED STATES

No. 440, October Term, 1965

UNITED STATES, PETITIONER

v.

UTAH CONSTRUCTION AND MINING CO.

ORDER ALLOWING CERTIORARI—November 8, 1965.

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is placed on the summary calendar and is set for oral argument immediately following No. 439.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutory and contractual provisions involved.....	3
Statement:	
1. Background.....	3
2. Administrative claims and proceedings	4
3. Proceedings in the Court of Claims.....	6
Reasons for granting the writ.....	9
Conclusion.....	18
Appendix.....	19

CITATIONS

Cases:

<i>Allied Paint & Color Works v. United States</i> , 309 F. 2d 133.....	14
<i>American Well Works Co. v. Lane & Bowler</i> Co., 241 U.S. 257.....	14
<i>Bateson Construction Co. v. United States</i> , 319 F. 2d 135.....	17
<i>Carlo Bianchi and Company, Inc., v. United</i> <i>States</i> , 157 Ct. Cl. 432.....	10
<i>Continental Illinois National Bank v. United</i> <i>States</i> , 126 Ct. Cl. 631, 115 F. Supp. 892....	17
<i>Peyton v. Railway Express Agency</i> , 316 U.S. 350.....	14
<i>Silverman Bros. v. United States</i> , 324 F. 2d 287..	14, 17

Cases—Continued

	Page
<i>United States v. Anthony Grace & Sons, Inc.</i> , 345 F. 2d 808.....	10
<i>United States v. Blair</i> , 321 U.S. 730.....	15
<i>United States v. Caltex</i> , 344 U.S. 149.....	2
<i>United States v. Carlo Bianchi & Co.</i> , 373 U.S. 709.....	7, 10, 12, 13
<i>United States v. Central Eureka Mining Co.</i> , 357 U.S. 155.....	2
<i>United States v. Hamden Co-operative Creamery Co.</i> , 297 F. 2d 130.....	14, 17
<i>United States v. Holpuch</i> , 328 U.S. 234.....	15
<i>United States v. Peter Kiewit Sons' Co.</i> , C.A. 8, No. 17,869, decided June 1, 1965.....	13, 14
<i>Universal Ecsco Corp. v. United States</i> , 345 F. 2d 586.....	16
Statutes:	
28 U.S.C. 1255 and Reviser's Note, p. 5958..	2
31 U.S.C. 71.....	17
Wunderlich Act, 41 U.S.C. 321.....	12, 13
Miscellaneous:	
H. Rep. No. 1380, 83d Cong., 2d sess.....	13
Shedd, <i>Disputes and Appeals</i> , 29 Law & Con- temp. Prob. 39.....	17

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. _____

UNITED STATES OF AMERICA, PETITIONER

v.

UTAH CONSTRUCTION AND MINING CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS _____

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Claims in this case, which was entered on December 11, 1964.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 19-39) is reported at 339 F. 2d 606. The memorandum of the commissioner of that court (App. B, *infra*, pp. 40-57) is unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on December 11, 1964. Respondent's timely petition for reconsideration was denied on March 12, 1965. By order entered on June 10, 1965, the Chief Justice extended the time for filing this petition to and

including August 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).¹

QUESTIONS PRESENTED

1. Whether a court may take evidence *de novo* to resolve factual disputes in a suit on a government contract if the same factual issues have previously been resolved by the administrative board whose determination of "all disputes concerning questions of fact arising under this contract" is made "final and conclusive" by the standard disputes clause of the contract.

2. Whether factual disputes relevant to claims for breach of contract are covered by the provision of the standard disputes clause which requires the parties to submit for administrative determination "all disputes concerning questions of fact arising under this contract."

¹ The order which the petition seeks to review is not a final judgment granting or denying relief, but it does finally determine the rights in issue—i.e., the right to be free from a second evidentiary hearing in cases based upon government contracts containing a standard disputes clause. The jurisdictional statute (28 U.S.C. 1255) does not contain any requirement of finality, and its revisers stated, "Review under this section is unrestricted." 28 U.S.C., Reviser's Note to Section 1255, p. 5958. This Court has jurisdiction to review interlocutory orders of the Court of Claims which determine liability, entered prior to trial or determination of damages. *United States v. Caltex*, 344 U.S. 149; *United States v. Central Eureka Mining Co.*, 357 U.S. 155. We believe there is no material distinction between such interlocutory orders and the one at bar, which determined finally the rights of the parties on the issue upon which review is being sought.

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statute and the contract involved are set forth in Appendix C, *infra*, pp. 58-62.

STATEMENT

1. *Background.*—This case arose out of a contract, executed in March 1953, between the United States, acting through the Atomic Energy Commission, and respondent ("Utah" or "the contractor"), for the construction of an Assembly and Maintenance Area and Administration Area at the Aircraft Nuclear Propulsion Project of the National Reactor Testing Station in Jefferson and Butte Counties, Idaho, at a price of \$4,583,028.20. The contract contained a standard government disputes clause (App. C, *infra*, p. 61) providing for the resolution of "all disputes concerning questions of fact arising under this contract" by the contracting officer and, upon timely appeal from his decision, by the duly authorized representative of the A.E.C., "whose decision shall be final and conclusive upon the parties." In addition, the contract contained standard clauses concerning "changes," "changed conditions" and "delays-damages." See App. C, *infra*, pp. 58-61. Work on the contract was completed on January 7, 1955.

During and subsequent to the performance of the contract, disputes arose between respondent and representatives of the A.E.C. Respondent submitted these to the contracting officer pursuant to the disputes clause. The contracting officer resolved them—some favorably to respondent and some adversely—

and assessed liquidated damages and other charges against respondent by reason of its failure to meet the original contractual schedule. Respondent took appeals to the A.E.C.'s Advisory Board of Contract Appeals from several of the contracting officer's decisions. As a result of negotiations between the parties, respondent agreed to waive or withdraw several of its claims, and the A.E.C. agreed to cancel its assessment for liquidated damages and other delay charges and to pay the remaining balance. All disputes between the parties were settled in this manner except for five claims which had been resolved by the contracting officer, four of which were then pending before the Board. App. B, *infra*, p. 41. These claims constitute the basis of the present controversy between the parties.

2. *Administrative Claims and Proceedings.*—Three of the four excepted claims requested relief under the "changed condition" clause of the contract (Art. 4), and one under the "changes" clause (Art. 4). The claims were for both increased compensation and extensions of time for performance, and the relief sought in the three claims filed under the "changed conditions" clause sought actual increases in the cost of performance and increased costs due to delay.

Three of the administrative claims² were heard before a panel of the A.E.C.'s Advisory Board consisting of Dean Robert Kingsley, of the School of Law of the University of Southern California, and

²The "pier drilling claim," the "shield window claim," and the "shield door claim."

Edmund R. Purvis, a consulting architect of Washington, D.C.³ Adversary hearings were held before the panel, which ruled that its jurisdiction in regard to each matter before it was "clear," and it rendered decisions containing findings of fact.

On the "shield window claim" the Board found that the difficulties and delays were caused in part by inherent difficulties in the work, and it granted extensions of time. It found, however, that the drawings and specifications were accurate and adequate, and that the difficulties and delays were caused in large part because of respondent's inexperience ("Utah simply did not know how to do the job") and workmanship, and accordingly refused to grant additional compensation. On the "pier drilling claim," the Board agreed with respondent that changed conditions had been encountered which were not adequately described in the drawings or borings, and it remanded to the contracting officer to allow respondent to prove that it, not the subcontractor, bore the increased costs.⁴ The Board found, however, that any delays encountered in pier drilling did not result in delays in the pouring of concrete or in the construction of the buildings, and accordingly denied (in that respect) the claims for extensions of time and for increased costs due to delay. On the "shield door claim," the Board ruled that there were no changes as to most of the matters complained of, and that,

³ Under the regulations then in effect the Board consisted of persons who were not government employees.

⁴ Respondent was not able to prove increased costs to itself, so its claim in that regard was closed.

where changes were made, the claims were untimely, having been asserted over a year after the event rather than in the ten days specified in Article 3. App. B, *infra*, pp. 41-42, 49-51, 52-53.

Respondent's appeal on the "concrete aggregate claim" was heard by an A.E.C. hearing examiner. Respondent relied upon the changed condition clause, which required notification by the contractor "immediately" upon discovery. The hearing examiner found that respondent was aware of the condition in July 1953 (it had made a claim of \$8,640 in additional compensation at that time, which was paid), but that it had not submitted its present claim of \$109,000 until July 1956. Accordingly, he ruled that "Utah has failed to promptly notify the Contracting Officer" of its \$109,000 claim and dismissed it as untimely. Respondent did not seek Commission review of that decision as it was entitled to do under the A.E.C.'s rules of practice. App. B, *infra*, pp. 45-49.

3. *Proceedings in the Court of Claims.*—Respondent brought this action for damages (in the amount of \$1,485,916.21) in the Court of Claims by petition filed in January 1961. The basic facts alleged in the petition were in large part the same facts asserted by respondent as the basis of the five claims pending administratively (the claims excepted from the release). In addition to the specific claims, respondent alleged that the government's delays, misrepresentations and failures to perform in accordance with express or implied warranties resulted in delays and increased expenditures on its part, and estimated that 90 percent of its increased costs were due to

government-caused delays. At the same time, the petition alleged that respondent had performed within the contract period as extended by mutually agreed upon modifications and change orders.

In the proceedings before the commissioner, respondent took the position that the controversies did not "arise under" the contract, and hence were beyond the scope of the disputes clause so that evidence could be taken *de novo* consistently with *United States v. Carlo Bianchi & Co.*, 373 U.S. 709. The government contended that the disputes were of the kind "arising under" the contract within the scope of the disputes clause, so that the court proceedings should be confined to a judicial review of the administrative record. The commissioner ruled that the contractor was entitled to a *de novo* trial on each of the four claims (App. B, *infra*, pp. 43-45, 47-48, 51-52, 53-55).

The government sought review of the commissioner's order. The Court of Claims ruled that the language in the standard disputes clause providing an administrative remedy for "disputes concerning questions of fact arising under this contract," (p. 22, *infra*);

* * * means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.

The court distinguished between the two kinds of claims in the following example (pp. 24-25, *infra*):

For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the

change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days, but his only recourse is an appeal to the head of the department whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter, so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute "arising under the contract." It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

The majority of the Court of Claims went on to rule that the administrative resolution of factual disputes which were relevant to claims "arising under" the contract (and thus properly decided under the dis-

putes clause under its construction of that clause) were not binding upon the parties in a suit for breach of contract. The majority therefore affirmed the commissioner's ruling that the case should proceed to a trial *de novo* on three of the four claims* and ruled that the "shield door claim" was one "arising under" the contract, so that the administrative determination was binding. Judge Davis dissented* on the ground that the administrative determination of factual disputes, properly made under the disputes clause after full hearing, should be binding upon the parties in subsequent judicial actions for breach of contract.

REASONS FOR GRANTING THE WRIT

In this case the Court of Claims has announced and applied a general rule of prospective application regarding the scope of the standard disputes clause of government contracts and the effect of administrative decisions rendered thereunder. Consequently, the rule applied in this case will govern the nature of judicial proceedings in most of the government contract cases now pending in the Court of Claims, involving claims of more than \$180,000,000, and in cases which will be filed there based upon present government contracts. We believe that the rule announced here by the Court of Claims is inconsistent with principles previously established by this Court,

* As for the claim for concrete aggregate, the court declined to indicate whether it believed that it was a "breach" claim or an "arising under" claim since the A.E.C. examiner had not reached the merits of the claim but had rejected it as untimely.

* Chief Judge Cowen concurred with the majority without reaching the issue on which Judge Davis dissented.

conflicts with the language of the disputes clause itself, and is at odds with the rule adopted by courts of appeals. Review by this Court is necessary to resolve the important and recurring issue presented by this case, and to eliminate the confusion and uncertainty engendered by decisions of the Court of Claims on this subject in the past two years.⁷

1. In *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, this Court disapproved the prior practice of the Court of Claims whereby it received evidence *de novo* in virtually all government contract cases, even though the facts had already been determined administratively pursuant to the terms of the standard disputes clause of such contracts. The Court held, with regard to disputes covered by the clause, that judicial proceedings should be limited to review of the administrative findings and record.⁸

In this case the Court of Claims has in large part deprived the *Bianchi* rule of practical effect by holding that factual disputes relating to claims for "breach of contract" must be determined by a judicial trial in which new evidence may be presented, even if they have already been decided administratively.

⁷ We are also seeking certiorari in *United States v. Anthony Grace & Sons, Inc.*, 345 F. 2d 808, a case involving a related but somewhat different application of the disputes clause by the Court of Claims.

⁸ Although the issue of the coverage of the disputes clause was tendered by the government in that case, and a major part of the contractor's claim there was for delay damages (see 157 Ct. Cl. 482, 460-461, 466-467; Record, No. 529, O.T. 1962, pp. 9, 11), the contractor conceded that the disputes were covered by the disputes clause. Consequently this Court was not required to rule on that issue. 373 U.S. at 714.

Claims for "breach of contract," involve the same kinds of factual issues and, indeed, usually turn on the identical factual disputes involved in claims "arising under" the same contract (pp. 16-17, *infra*). The result of the rule adopted by the Court of Claims, therefore, is to require, at the request of either party, two evidentiary hearings on the same or closely related factual issues with respect to every contractual dispute which can be framed as both a "breach" claim and an "arising under" claim.

The effect is vividly demonstrated by the court's disposition of the claims presented by this case. The "pier drilling claim" is illustrative. Before the contracting officer and the Board, respondent claimed increased drilling costs of \$17,934.63, a time extension of eleven months for delays and \$83,431.46 for increased costs of building construction due to delays, all attributed to the existence of loose or "float rock" which constituted a "changed condition" under Article 4 (App. C, *infra*, p. 59), not disclosed on the drawings or borings. The Board found, after a full-scale adversary hearing which produced a voluminous record, that respondent had encountered subsurface float rock which was a changed condition within the meaning of Article 4, and that this changed condition resulted in some increases in the cost of drilling to the subcontractor and in some delay. The Board ruled, however, that respondent had not shown any increased cost to it and that any delays caused by the float rock did not result in delays in pouring the concrete or in completing the contract. Accordingly, the Board denied respondent's claims for an extension of time

and for increased compensation for such delays.* Under the rule adopted by the Court of Claims, however, the parties are not bound by the evidence presented to the Board, and respondent is entitled to a second evidentiary hearing on all the facts relating to such delays.

This "duplication of evidentiary hearings" imposes "a heavy additional burden in the time and expense required to bring litigation to an end." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 717. Such a duplication of effort, expense, and time is inconsistent with an orderly system for the administration of justice, and this Court should be and has been "loath to condone any procedure under which the need for expeditious resolution would be so ill-served." *Ibid.*

2. The rule adopted by the Court of Claims is, we submit, contrary to the language and policy of the disputes clause and the governing statute. The standard disputes clause applies in terms to "all disputes concerning questions of fact arising under this contract" and makes the administrative determination thereunder "final and conclusive upon the parties thereto" (p. 61, *infra*). The Wunderlich Act, 41 U.S.C. 321 (p. 58, *infra*), makes such administrative factual decisions "final and conclusive" unless "arbitrary" or "not supported by substantial evidence."

* The Board believed that it had jurisdiction over respondent's claims for delays as well as for increased costs. But even under the dichotomy adopted by the Court of Claims, which would apparently bar the Board from considering claims for "unreasonable" delays, the Board concededly had authority to act upon respondent's request for an extension of time, and in so doing was obliged to resolve the factual disputes underlying that claim.

Hence both the contract and the statute render final (subject only to judicial review on the administrative record) facts which are litigated and decided administratively pursuant to the disputes clause. Neither the clause nor the statute limits the rule of finality to claims which may be heard by the administrative boards; the factual determinations are final, so far as the litigating parties are concerned, for all purposes. Certainly, the most reasonable construction of this language is that the parties are estopped with regard to all factual findings made by the administrative board unless they are "arbitrary" or "not supported by substantial evidence."

One of the purposes of the Wunderlich Act was "to require each party to present openly its side of the controversy and afford an opportunity of rebuttal" at the administrative hearings. H. Rep. No. 1380, 83d Cong., 2d Sess., p. 5. As this Court has previously recognized, this Congressional purpose "would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding." *United States v. Carlo Bianchi Co.*, 373 U.S. 709, 717. Yet that result follows from the decision of the Court of Claims here.

3. The decision below conflicts with cases decided by the courts of appeals. In *United States v. Peter Kiewit Sons' Co.*, C.A. 8, No. 17,869, decided June 1, 1965, for example, the court held that factual disputes concerning a contractor's claim for unliquidated damages were within the scope of the disputes clause, and that a contracting officer's decision in regard to them should be accorded finality,

notwithstanding the contractor's contention, based upon the decision of the Court of Claims in this case,¹⁰ that the administrative determination should have no effect because the claim was one for breach of contract. Courts of appeals have consistently held that if factual issues are litigated and determined administratively under the disputes clause, the administrative findings are (unless arbitrary or unsupported by evidence) binding upon the court irrespective of the nature of the claim made in court. See *Allied Paint & Color Works v. United States*, 309 F. 2d 133, 138 (C.A. 2); *United States v. Hamden Co-operative Creamery Co.*, 297 F. 2d 130, 133-135 (C.A. 2); *Silverman Bros. v. United States*, 324 F. 2d 287, 289-290 (C.A. 1).

4. Agreeing, in the respects stated above, with Judge Davis' dissent, we present a further contention. The disputes clause encompasses "all disputes concerning questions of fact arising under this contract." This, we suggest, applies to all factual disputes concerning rights and duties created or defined by the contract, at least insofar as the factual issues are of the kind committed to administrative determination by the contract.¹¹

¹⁰ See Brief for Appellee, in C.A. 8, No. 17,869, pp. 14-16.

¹¹ A case or controversy "arises under" the Constitution or an Act of Congress if the cause of action had its origin in and is controlled by federal law—i.e., if federal law creates the cause of action. *Peyton v. Railway Express Agency*, 316 U.S. 350, 352-353; *American Well Works Co. v. Lane & Bowler Co.*, 241 U.S. 257, 260. Similarly, we believe, a factual dispute "arises under" the contract within the meaning of the disputes clause, if the contract creates and defines the rights and duties of the parties in regard to the subject matter of the dispute.

The majority opinion of the Court of Claims distinguishes between factual disputes concerning "the rights of the parties given by the contract"—which it regards as disputes "arising under" the contract within the meaning and coverage of the disputes clause—and disputes "over a violation of the contract"—which it considers to be "breach" disputes, outside the coverage of that clause (p. 22, *infra*). But every claim by a party regarding his rights under a contract necessarily amounts to a claim that the other party failed to honor those rights and thereby violated the contract. No satisfactory distinction can be drawn between disputes "arising under" the contract and those concerning "breach" claims; any right sounding in contract can, we submit, be structured to fit either category.¹² Indeed, without discussion, this Court has, in two instances, ruled that claims which the Court of Claims would now classify as "breach" claims did arise under the contract and were covered by the disputes clause. See *United States v. Blair*, 321 U.S. 730, 734-735; *United States v. Holpuch*, 328 U.S. 234.

Considerations of policy likewise weigh against the attempted distinction. Even under Judge Davis' dissenting view, the party losing before the administra-

¹² The classic "breach" case—a total failure by one party to perform what it has promised to do—can be viewed as a suit to enforce the other party's right to performance, which is a right "arising under" the contract.

tive tribunal¹³ would be permitted to obtain a second evidentiary hearing if it alleges facts concerning its breach claim which were not actually litigated and decided administratively. This invites a contractor to split his claims and theories under different headings, reserving some (by way of insurance) for a second round. It also affords him the option of short-circuiting the administrative process entirely by suing immediately on a breach theory, thereby avoiding the administrative determinations contemplated by the disputes clause.¹⁴ In either event, there is a frustration of the arbitral function which the comprehensive disputes clause is designed to serve.

At the least, when (as here) factual disputes relate to claims which are of the kind clearly committed to administrative determination by the contract, they should be held to fall within the disputes clause. In this case, for example, standard contractual provisions (Articles 3, 4, and 9) clearly committed to agency determination factual disputes over whether delays were caused by matters within the control of the contractor, and whether unforeseen and changed conditions resulted in any increased cost or delay. Since the asserted "breach" claims turned on factual issues

¹³ While the government, acting through the General Accounting Office, does not often seek judicial relief contrary to a Board ruling, it has the authority to do so, and does on some occasions.

¹⁴ The Court of Claims sanctioned this procedure in its recent decision in *Universal Eesco Corp. v. United States*, 345 F. 2d 586.

of the same kind, they, too were within the Board's primary jurisdiction.¹⁵

¹⁵ The Court of Claims relied partly upon the asserted lack of authority of the agencies who administer the contracts to pay claims for unliquidated damages, particularly those for delay damages. See p. 21, *infra*; *Continental Illinois National Bank v. United States*, 126 Ct. Cl. 631, 640-641, 115 F. Supp. 892, 897. The agencies have frequently asserted that they lack authority to pay such claims, but these disclaimers originated from the absence of statutory authority to pay. Shedd, *Disputes and Appeals*, 29 Law & Contemp. Probs. 39, 57. Where the factual disputes are closely related to those involved in claims upon which the contract expressly authorizes the agency to grant relief, the usual practice is for the agency to hear and determine all the factual disputes. While the agency itself may not be able to grant full relief in such circumstances, the government, acting through the General Accounting Office, clearly has authority to do so upon appropriate agency findings. 31 U.S.C. 71. If that office refuses to pay, the contractor is free to sue on the basis of the administrative findings and record, just as the government does where it sues affirmatively asserting breach of contract by the contractor. *E.g.*, *United States v. Hamden Co-operative Creamery Co.*, 297 F. 2d 130 (C.A. 2); *Silverman Bros. v. United States*, 324 F. 2d 287 (C.A. 1). While we do not believe that express authority under the contract to grant relief is a necessary prerequisite to coverage under the disputes clause, we reserve our right to show that in this case there was such authority. See GC-25, pp. 61-62, *infra*; and *Bateson Construction Co. v. United States*, 319 F. 2d 135 (Ct. Cl.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RALPH S. SPRITZER,
Acting Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,

DAVID L. ROSE,
Attorneys.

AUGUST 1965.

APPENDIX A

In the United States Court of Claims

No. 3-61

(Decided December 11, 1964)

UTAH CONSTRUCTION AND MINING COMPANY v. THE UNITED STATES

Gardiner Johnson for plaintiff. *Thomas E. Stanton, Jr.*, and *Charles J. Heyler* of counsel.

Irving Jaffe, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *James F. Merow* was on the briefs.

Before *COWEN*, Chief Judge, *DURFEE*, *DAVIS*, and *COLLINS*, Judges, and *WHITAKER*, Senior Judge.

ON DEFENDANT'S REQUEST FOR REVIEW OF COMMISSIONER'S ORDER

WHITAKER, Senior Judge, delivered the opinion of the court:

Plaintiff had a contract with the Atomic Energy Commission for the construction of an assembly and maintenance area at the National Reactor Testing Station in Jefferson and Butte Counties, Idaho. The contract was fully performed on January 7, 1955, several extensions of time having been granted on account of delays for which the contractor was not responsible. During the performance of the contract and after its completion, plaintiff made various claims for increased costs and for damages, some of which were claims

arising under the contract and some for alleged breaches of contract by the defendant on account of delays and other causes.

The case was referred to Trial Commissioner C. Murray Bernhardt for the taking of testimony and for a report. On February 18, 1964, the commissioner issued an order defining the scope of the testimony to be taken with reference to the several claims, in the light of the Supreme Court's opinion in *United States v. Bianchi*, 373 U.S. 709 (1963). The defendant now asks us to review this order.

Prior to *United States v. Wunderlich*, 342 U.S. 98 (1951), this court had held that in determining whether or not the action of the contracting officer or the head of the department was arbitrary or capricious or unsupported by substantial evidence or otherwise contrary to law, it was not confined to the evidence before the Board of Contract Appeals (which in most cases was the representative of the head of the department), but was entitled to receive evidence *de novo*. However, the Supreme Court in *United States v. Wunderlich*, *supra*, held that we were bound by the action of the contracting officer on claims arising under the contract unless his action was fraudulent; that is to say, unless it amounted to conscious wrongdoing. Following this decision, the Congress enacted what is known as the Wunderlich Act, being the Act of May 11, 1964, 68 Stat. 81. This act in substance provided that the decision of the head of a department or his duly authorized representative or board "in a dispute involving a question arising under such contract * * * shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Following the enactment of this statute, this court first held in *Wagner Whirler and Derrick Corp. v. United States*, 128 Ct. Cl. 382, 121 F. Supp. 664 (1954), that the Wunderlich Act was designed to restore the *status quo ante* the decision of the Supreme Court in *United States v. Wunderlich*, *supra*, but we did not decide in that case whether or not *de novo* evidence was admissible to determine whether the action of the board was arbitrary, etc. However, in *Valentine and Littleton v. United States*, 136 Ct. Cl. 638, 145 F. Supp. 959 (1956), we explicitly held that since the purpose of Congress

was to restore the *status quo ante* and since the practice prior to the *Wunderlich* decision had been to receive evidence *de novo*, we would continue to do so. We reiterated this position in *Bianchi v. United States*, 144 Ct. Cl. 500, 169 F. Supp. 514 (1959), 157 Ct. Cl. 432 (1962); but the Supreme Court reversed and held that in the determination of this question we were confined to the evidence admitted before the board. *United States v. Bianchi*, 373 U.S. 709 (1963).

In cases where the administrative record was defective or inadequate, the Court had this to say:

* * * *First*, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second*, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co. v. United States*, 363 U.S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court. [373 U.S. 709, 717-18.]

Where the dispute "arises under the contract" the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc. v. United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin v. United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Co. v. United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States v. Beutlas, et al.*, 324 U.S. 768 (1944). If they undertake to do so—which they rarely do—

neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882); *Coyle v. Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F. Supp. 109, 111 (S.D.N.Y. 1941).

Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to "disputes concerning questions of fact *arising under this contract*." This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.

The Supreme Court's opinion in *Bianchi*, *supra*, restricting the evidence to be considered by this court to the record before the Appeals Board, is expressly limited to "matters within the scope of the disputes clause." At page 714 the Court said:

Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. * * *

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.

Finally, in conclusion, the Court said:

* * * We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to review

of the administrative record under the standards in the Wunderlich Act and may not receive new evidence. * * * [373 U.S. 709, 718.]

The opinion of the Supreme Court was thus restricted to "matters within the scope of the disputes clause." An action for breach of contract is not within the scope of this clause.

However, it may be that the contracting officer and the head of the department may find a fact relevant to the settlement of a dispute arising under the contract, which fact may also be relevant on the question of the right of the plaintiff to recover for breach of contract. What effect is to be given to such a finding?

Let it be noted that no statute gives the contracting officer and the head of the department, or his representative, authority to decide the rights of the parties to a Government contract; their authority is derived solely from the contract between the parties. *Langevin v. United States, supra*, at 30.

The contract in Article 15 provides that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto." (Emphasis added.) Thus, the board's authority is limited to disputes "concerning questions of fact arising under this contract." It is only such disputes which the contracting officer and the head of the department have jurisdiction to resolve and on which their findings of fact are final and conclusive. The parties did not contract that *their findings of fact should be conclusive in suits for breach of contract*. In such suits the contract does not bind a judicial tribunal to accept their findings, although they may have been relevant to a dispute "arising under the contract."

Had plaintiff been permitted to submit the dispute over what it was claiming to a judicial tribunal established by Congress with authority to find the facts and decide the dispute, and it had done so, plaintiff, under the doctrine of collateral estoppel, would have been bound by the tribunal's findings, both in the cause of action submitted and in a later proceeding between the same parties on a different cause of action. *Commissioner v. Sunnen*, 333 U.S. 591 (1948). The reason for this rule is to save the time of the courts and to

protect a litigant from having to relitigate an issue previously submitted to a judicial tribunal and decided by it.

But neither the contracting officer nor the head of the department, or his representative, is a judicial tribunal created by Act of Congress; they derive their authority solely from the contract between the parties, and their authority is limited by the terms of the contract. That contract authorizes them to make findings and to decide disputes "arising under the contract." It is only as to such disputes that their findings and decisions are made final and conclusive. It does not make them final and conclusive on a dispute over whether there has been a breach of the contract.

When a party submits his case to a judicial tribunal, he does so in light of the rule that its findings of fact are binding on him, not only in that litigation, but in all other litigation between the same parties. But this rule does not apply where a contract requires him to submit his claim, not to a judicial tribunal, but to a person designated by the contract; in such case he does so subject only to the terms of the contract, and the effect of the findings and decision of the designated person is that set out in the contract and no more.

So, when a party appeals to a judicial tribunal to determine whether the other party has breached the contract, it is not bound by a finding of a person only authorized to decide disputes "arising under the contract," and it is entitled to ask the judicial tribunal to make its own findings and render its decision based on those findings. Since this is the first time that recourse has been had to a judicial tribunal, that tribunal not only may, but it is obligated, to make its own findings. Never before has the contractor "had his day in court."

For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days, but his only recourse is an appeal to the head of the department whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter,

so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute "arising under the contract." It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

In any case we would so construe the contract between the parties, but in this case there is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to agree to accept the contract drawn by the Government; indeed, the advertisement for bids so stipulates. These contracts all contain this "disputes" clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employee, and whose prime duty is to be diligent in the protection of the Government's interests and to require that the contractor strictly comply with the terms of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult. An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms. See *Langevin v. United States*, *supra*; *B-W Construction Co. v. United States*, *supra*; and *Miller, Inc. v. United States*, *supra*.

The Atomic Energy Commission's Advisory Board of Contract Appeals in the *Appeal of Utah Construction Com-*

pany (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:

It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter "relating to" and not one "arising under" the contract. The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.

In conclusion, we hold that in a suit for breach of contract we are not bound by a finding of fact of the Board of Contract Appeals even though that finding is relevant to "a dispute arising under the contract."

With these general principles in mind, we proceed to consider the commissioner's order with respect to the several claims. The commissioner divides them into these six categories, (1) with respect to the pier drilling, (2) the concrete aggregate, (3) the shield windows, (4) the shield door, (5) the Amercoat paint, and, finally, the delay damages claim.

1. *Pier Drilling Claim.*

Plaintiff claims that in the drilling and excavation for "piers," or foundation shafts for certain buildings, it encountered subsurface conditions differing materially from those indicated in the contract documents. First, it claimed additional compensation for the extra cost of drilling the "float rock" which it had encountered and which it claimed was not shown on the contract documents. This claim was denied by the contracting officer on the ground that no changed conditions had been encountered. The Advisory Board of Contract Appeals, the representative of the head of the Atomic Energy Commission, reversed and found that the float rock did constitute a changed condition but that no additional cost had been incurred by plaintiff thereby unless it was liable therefor to its drilling subcontractor. The claim was remanded to the contracting officer to determine the amount of the increased cost of drilling.

Certain letters have been filed with the commissioner to indicate that plaintiff did not further prosecute its claim for increased cost and, hence, neither the contracting officer nor the board allowed plaintiff any sum therefor.

The commissioner holds plaintiff is not entitled to recover in this court therefor by reason of failure to exhaust its administrative remedy. The commissioner was correct in affirming the action of the board since this question was a dispute "arising under the contract."

Plaintiff also claims damages for delay by reason of the refusal of the contracting officer to modify the contract on account of the changed conditions encountered. Since this is an action for breach of contract, the parties are not bound by the decision of the board and may introduce evidence *de novo* concerning any unreasonable delay that may have been occasioned thereby.

In *United States v. Rice*, 317 U.S. 61 (1942), it was held that, where a contract was modified on account of changed conditions encountered, the contractor was entitled to increased costs and an extension of time, but not to damages incident to the delay. However, where the contracting officer delays unreasonably in modifying the contract, the contractor is entitled to recover damages for such part of the delay as was unreasonable. *McGraw & Co. v. United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394 (1955), and cases cited. Here the contract was not modified until after completion of the work.

It is not apparent how this could have delayed plaintiff because plaintiff has failed to show that the changed conditions increased its costs, but if it was unreasonably delayed, plaintiff is entitled to recover for breach of contract.

2. Concrete Aggregate Claim.

The contract allowed the contracting officer to purchase concrete aggregate from the Government's supplies and the contractor did so. Early in the performance of the contract it was discovered that the concrete did not have the required strength and that the dirty condition of the aggregate was responsible therefor. To supply the necessary strength, the contracting officer required plaintiff to add one sack of cement to each cubic yard of concrete mix during the time the Government was washing the concrete so as to bring it

up to specification requirements. Plaintiff submitted to the contracting officer a claim for the extra cement used and was reimbursed therefor.

More than a year after the contract had been completed, plaintiff filed a claim for additional costs incurred because of the poor condition of the aggregate. The contracting officer was of the opinion that this additional claim of the plaintiff was one for breach of contract and, therefore, one which he had no authority to decide under the terms of the "disputes" article. He also thought the claim was untimely.

Plaintiff appealed to the head of the department. The Advisory Board of Contract Appeals dismissed the claim for failure of the plaintiff to make timely presentation of it.

If this claim be one for breach of contract, as our commissioner supposes, we have jurisdiction to determine it and to receive evidence *de novo*.

However, assuming the claim is not for breach of contract, we cannot agree with the commissioner that the failure of the board to consider the case on its merits gives plaintiff the right to introduce evidence *de novo* in this court. If we decide the board should have considered the claim on its merits, we should suggest to the board that it consider it on the merits and suspend proceedings here until it has had a reasonable opportunity to do so.

3. *Shield Windows Claim.*

Under the original contract defendant undertook to furnish the shield windows to be installed in the building to be constructed, but by modifications 2 and 4 thereof, plaintiff was required to negotiate a contract with the Corning Glass Works for the procurement of these shield windows, which it did.¹ The windows were supposed to comply with contract specifications and with the shop drawings and samples. Plaintiff complains that defendant unreasonably delayed in approving the shop drawings. It also says that the designated authority first approved the type II windows but that other agents of the defendant later rejected them and still later the defendant reversed its rejection and again approved

¹ These shield windows were designed to permit observation of what was going on within the atomic reactor without subjecting the observer to radioactive radiation.

them. It also alleges delay in connection with the approval of type I windows.

The plaintiff presented its claim on this item for a time extension for excusable delay and an equitable adjustment for increased costs under the Changed Conditions article of the contract. The commissioner states that he cannot determine from the record what part of the claim arises under the contract and what part of it is for damages for delay; but he concludes that the basic issue is whether or not the plaintiff was unreasonably delayed by acts of the Government. As to such claim he properly says that the decision of the head of the department is not final and *de novo* evidence may be introduced in this court.

Defendant's contention that the filing of the claim for delay with the contracting officer under the Changed Conditions article forecloses plaintiff from bringing suit for damages for delay cannot be sustained. The contracting officer could only grant an extension of time for delay (*United States v. Rice, supra*); he could not award damages for unreasonable delay.

It appears that the board over a period of 3 days heard testimony with respect to this claim, including the claim for delays, and that the transcript of this testimony runs to 453 pages, and that many exhibits were filed; hence, the commissioner suggests that the parties might well agree to stand on this record, with permission to supplement it with respect to the delay claim to such extent as they think proper. Certainly the parties ought to desist from duplicating the administrative record but, insofar as the claim relates to damages for unreasonable delay, the parties are not foreclosed by it nor from supplementing it, if they wish.

4. *Shield Door Claim.*

This claim was presented under the Changes article of the contract under which the contractor asked for extra costs by reason of a change in the drawings and specifications. The contracting officer disallowed the claim because it was not presented within 10 days as required by Article 3 of the contract.

After completion of the work, final payment was made to the contractor and a release was signed by it from which it excepted certain claims, including this shield door claim.

According to defendant's answer, which is not rebutted by plaintiff, it released the Government "from all claims arising under, in connection with or by virtue of the subject contract and all modifications thereto with the exception of the shield window claim, the pier drilling claim, and the shield door claim, the concrete aggregate claim, and the sum of \$5,606.39 which was withheld pending a decision in the Amercoat appeal." The claim presented to the contracting officer with respect to the shield door did not advance any claim for increased costs on account of delays. If the release signed by plaintiff reads as set out in the Government's answer, it must be said that the Government was thereby released from all claims not specifically excepted, whether arising under the contract or in breach of the contract. *United States v. William Cramp & Sons*, 206 U.S. 118 (1907); *Watts Construction Co. v. United States*, Ct. Cl. No. 351-61, decided May 10, 1963. The exception of "the shield door claim" must have referred to the claim presented to the contracting officer. As stated, that claim did not refer to damages for delay. Hence, the commissioner is correct in saying that any evidence with reference to damages for delay on account of the shield door is inadmissible, because foreclosed by the release.

As to the claim made for extra work on account of changes made in the shop drawings, this is a claim "arising under the contract" and was within the authority of the contracting officer to determine. The contracting officer disallowed the claim because it was not presented within 10 days as required by Article 3 of the contract. The board held that a part of plaintiff's claim for extra costs must be disallowed because it did not constitute changes under the Changes article, and as to that part which did constitute changes the board held that it was barred by the failure of the plaintiff to present its claim within the 10-day period. These decisions, both of the contracting officer and of the board, were within their province. There is no allegation of arbitrary and capricious action and, hence, we have no jurisdiction to review the action of the board. It is, therefore, immaterial for the purposes of this motion that no record was made of the board's proceedings.

5. *The Amercoat Paint Claim.*

In the release signed by the plaintiff, according to the defendant's answer, it "excepted therefrom the sum of \$5,606.39 which was withheld pending a decision in the Amercoat appeal." This sum was subsequently paid plaintiff and, therefore, defendant has been relieved from all liability with respect to this Amercoat paint claim.

The commissioner's order of February 18, 1964, is amended accordingly.

Defendant's motion for partial summary judgment may be filed, but the same is overruled with leave to renew as to any matters contained therein not ruled upon in this opinion.

COWEN, *Chief Judge*, concurring in the result:

I concur with the majority and Judge Davis in rejecting the Government's sweeping contention that *de novo* evidence is inappropriate with respect to any factual question connected with the contract, regardless of the nature of the contractor's claim or the authority of the agency board or head of the department to decide the dispute to which such factual questions are related. For the reasons stated in both opinions, defendant's position, that the Disputes clause requires the administrative agency to make binding factual determinations on every question relating to the contract, is untenable.

It should be emphasized that we have before us only the review of a commissioner's order. Considering the stage in the trial at which the order was issued, the nature of the record before us, and the briefs of the parties, I do not believe that this case in its present posture presents the proper vehicle for laying down hard and fast rules to resolve all of the important issues urged upon us by the parties. As I understand, the major issue, which separates the views of the majority from those of Judge Davis, is the extent to which a finding made by an agency board on a claim for relief that can be granted under the terms of the contract will be binding in a subsequent court action for relief of the type which is not available under the terms of the contract, when the same factual question is again presented. I would reserve my decision until the facts and questions of law are adequately presented to the court at a stage in the proceedings where it can properly decide the matter.

I would also reserve decision as to the scope and effect of the Suspension of Work clause that was included in the contract in this case. Apparently both the contractor and the AEC Advisory Board on Contract Appeals considered that this clause has no application to any of the claims presented by the contractor. However, defendant argues that the Suspension of Work clause authorizes the contracting officer to pay the costs incurred by the contractor as a result of Government delays. A decision as to the application of that clause might have an important bearing on other questions to be decided in this case. However, as Judge Davis has pointed out, this case does not present that issue in its present posture.

With the foregoing preliminary statement, I concur in the result reached by the majority on the six claims covered by the trial commissioner's order.

DAVIS, *Judge*, concurring in part and dissenting in part:

1. I concur with the court in rejecting the Government's broad contention that the Disputes clause demands that *all* factual matters connected with the contract—whatever the nature of the claim—be tried and determined only by the agency board (or representative), with finality attaching to all those administrative factual findings which are adequately supported. That has never been the law during the long history of Disputes clauses. On the contrary, the finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions "arising under" the contract. Exhaustion of the administrative remedy has not been required and finality has not been accorded where the facts relate to a type of claim, such as for a breach, which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board can give no relief under the contract, and therefore cannot finally decide the facts.

This was the accepted distinction before the Wunderlich Act of 1954, 68 Stat. 81, 41 U.S.C. §§ 321-22.¹ There is certainly no ground for saying that that enactment changed this segment of Government contract law. The same rules have continued to be followed since the passage of that statute, both by the administrative agencies and by this court, explicitly and tacitly.² As the court's opinion in the present case points out, the Supreme Court's opinion in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (June 3, 1963), did not remotely suggest that these long-established rules were wrong or should be changed. That decision dealt solely with

¹ See *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629-30 (1937); *Plato v. United States*, 86 Ct. Cl. 605, 677-78 (1938); *Langevin v. United States*, 100 Ct. Cl. 15, 29-31 (1943); *Silberblatt & Lasker, Inc. v. United States*, 101 Ct. Cl. 54, 80-81 (1944); *Beuttas v. United States*, 101 Ct. Cl. 748, 767 *ff.*, 771 (1944), *rev'd on other grounds*, 324 U.S. 768 (1945); *Holton, Seelye & Co. v. United States*, 106 Ct. Cl. 477, 500, 65 F. Supp. 903, 907 (1946); *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212 (1948); *Hyde Park Clothes, Inc. v. United States*, 114 Ct. Cl. 424, 438, 84 F. Supp. 589, 592 (1949); *John A. Johnson Contracting Corp. v. United States*, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); *Continental Illinois Nat'l Bank v. United States*, 121 Ct. Cl. 203, 246, 101 F. Supp. 755, 759, *cert. denied*, 343 U.S. 963 (1952); *Potashnick v. United States*, 123 Ct. Cl. 197, 218-20, 105 F. Supp. 837, 839 (1952); *Continental Illinois Nat'l Bank v. United States*, 126 Ct. Cl. 631, 640-41, 115 F. Supp. 892, 897 (1953).

² I give only a relatively few samples. See, e.g., *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 506, 130 F. Supp. 394, 397 (1955); *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 652, 132 F. Supp. 698, 701 (1955); *Railroad Waterproofing Corp. v. United States*, 133 Ct. Cl. 911, 915-16, 137 F. Supp. 713, 715-16 (1956); *Peter Kiewit Sons Co. v. United States*, 138 Ct. Cl. 668, 151 F. Supp. 726 (1957); *Valentine & Littleton v. United States*, 144 Ct. Cl. 723, 726, 169 F. Supp. 263, 265 (1959); *Abbett Electric Corp. v. United States*, 142 Ct. Cl. 609, 613, 162 F. Supp. 772, 774 (1958); *A. S. Schulman Electric Co. v. United States*, 145 Ct. Cl. 399 (1959); *Snyder-Lynch Motors, Inc. v. United States*, 154 Ct. Cl. 476, 519, 292 F. 2d 907 (1961); *Helene Curtis Industries, Inc. v. United States*, Ct. Cl. No. 231-56, decided Feb. 6, 1963, slip op., pp. 53-54, 312 F. 2d 774; *W. H. Edwards Eng'r Corp. v. United States*, Ct. Cl. No. 218-59, decided April 5, 1963, slip op., p. 5; *Flippin Materials Co. v. United States*, Ct. Cl. No. 8-57, decided Jan. 11, 1963, slip op., p. 48, 312 F. 2d 408; *Ekeo Products Co. v. United States*, Ct. Cl. No. 464-57, decided Jan. 11, 1963, 312 F. 2d 768; *Ideker Constr. Co.*, IBCA No. 124 (1957), 57-2 B.C.A. par. 1441, pp. 4845-46; *Norair Eng'r Corp.*, ASBCA No. 3527 (1957), 57-1 B.C.A. par. 1283; *Craig Instrument Corp.*, ASBCA No. 6385 (1960), 61-1 B.C.A. par. 2875; *Kenneth Holt*, IBCA No. 279 (1961), 61-1 B.C.A. par. 3060; *Model Eng'r & Mfg. Corp.*, ASBCA No. 7490 (1962), 1962 B.C.A. par. 3363, p. 17,308; *Allied Contractors, Inc.*, IBCA No. 265 (1962), 1962 B.C.A. par. 3501, pp. 17,864-65. The Advisory Board on Contract Appeals of the Atomic Energy Commission took the same position (see the court's opinion, *ante*). See, also, Spector, Is It "Bianchi's Ghost"—or "Much Ado About Nothing", 16 Admin. Law Rev. 265, 290-91 (1964).

a matter conceded to be within the scope of the Disputes clause.²

With this history of almost thirty years, it is far too late to try to interpret the Disputes clause anew, as if the question had emerged for the first time. The practice is too firmly rooted to be puffed aside by grammatical refinements and hortatory appeals to the "plain language" canon. The judicial, administrative, and practical construction of the clause is too entrenched for any but the strongest of assaults. We have been presented with no such overwhelming reason for making this drastic change in Government contract law at this time.

2. I disagree, however, with the majority's holding that well-supported factual findings, appropriately made by the board in deciding a dispute "arising under the contract," are not binding in a court trial of a cause of action which is outside the Disputes clause (*e.g.*, for breach, reformation, etc.). If the board has relevantly and appropriately decided a certain factual issue in connection with a claim under the Changes or Changed Conditions article, etc., and if that finding is adequately sustained by the administrative record, my view is that then the court should accept the finding in deciding the breach claim (or other claim not "arising under the contract"). There should be no *de novo* evidence and no *de novo* finding on that particular factual issue. Of course, court evidence and court findings would be entirely proper as to all factual questions, remaining in the court case, which have not been finally determined by the agency tribunal; only those particular facts which have been actually found, and which survive scrutiny under the Wunderlich Act, would be conclusive. And, of course, a board could not gratuitously exceed its mandate by wandering off and finding facts which are not a true part of, and integral to, its determination under the substantive contract clause being applied.

This position, rather than the court's, seems to me required by the terms of the Disputes clause, the phrasing of the

² In the case at bar, the defendant does not rely on *Bianchi* to support its broad position. The Government's Supplementary Memorandum (p. 10) says, after quoting a sentence from the *Bianchi* opinion, 373 U.S. at 714, "Thus, *Bianchi* does not decide the scope of the standard disputes agreement in Government contracts, beyond the recognition that no argument was addressed to this question."

Wunderlich Act, the principle underlying the *Bianchi* decision, and the policy of collateral estoppel.⁴ Once an issue of fact arises in a controversy under the contract and is decided by the agency, the text of the Disputes clause makes that decision, if supported, final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation. The statute, too, is framed in terms of the conclusiveness, without restriction, of any supportable factual decision by the board “in a dispute involving a question arising under such contract.”⁵ The wording of both the Act and the contract clause seem to grant finality to all factual findings properly made by the board in the course of resolving a disputed question under the contract—not merely to the board’s findings on disputed issues of fact which themselves necessarily arise under the contract.

The *Bianchi* opinion articulates the basic rationale for accepting fully the Act and the clause as they are written—avoidance of “a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end” (373 U.S. at 717). This major underpinning of the *Bianchi* decision likewise supports the finality, in court, of all facts validly found by the board in the course of a determination under the contract. There is no need for a second hearing on an issue already tried and resolved.

This is the same general policy which nourishes the doctrine of collateral estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The

⁴ I know of no decision of this court which has addressed itself to this exact problem.

⁵ 41 U.S.C. § 321 provides: “No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit not filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.”

41 U.S.C. § 322 provides: “No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.”

Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be the fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are the fact-finders for other purposes. In the light of *Bianchi's* evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceeding, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, *Administrative Law* 566 (1951); *Fairmont Aluminum Co. v. Commissioner*, 222 F. 2d 622, 627 (C.A. 4, 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion.

3. With respect to a *de novo* trial, my disposition of the six separate claims with which we have to deal would be as follows:

a. *Pier Drilling Claim*: The only aspect of this claim now before us, on the Government's request for review of the Commissioner's order, is the ruling that plaintiff can introduce *de novo* evidence on the issue of whether it was delayed into the winter (and thereby suffered damage) in the pouring of concrete. This alleged delay in pouring concrete was part of an administrative claim that plaintiff was entitled to relief, under Article 4 (Changed Conditions), for the difficulties met after it encountered "float rock." The Advisory Board could not grant monetary compensation for this delay (*United States v. Rice*, 317 U.S. 61 (1942)), but under the express words of Article 4 the Board could allow an exten-

sion of time for performance. In refusing to give that relief, the Board specifically found that the delay due to the "float rock" did not operate to delay the building construction (*i.e.*, the pouring of concrete). Since this issue was then properly before the Board in the proceeding under Article 4, its finding of fact must be accepted (in my view) if adequately supported. There should be no *de novo* trial of this issue.

b. *Concrete Aggregate Claim*: I agree with the court on this part of the case. The Hearing Examiner never reached the merits of any claim and therefore decided nothing (on the merits) which would be binding here. If the present demand can correctly be deemed one for breach of contract, there should be a full trial. But if the demand properly comes under the contract, the Commissioner should decide whether or not the Hearing Examiner's ruling on the timeliness of the appeal is to be upheld. If so, the claim is at an end. If not, proceedings here should be suspended to allow the Atomic Energy Commission a reasonable opportunity to determine the merits of the claim. Like the court, I intimate no view as to the character of the claim (breach of contract vs. arising under the contract).

c. *Shield Window Claim*: Plaintiff sought both compensation and an extension of time under Article 4 (Changed Conditions) for this item—just as with the Pier Drilling Claim. Basing its decision on Articles 4 and 9 (Delays—Damages), the Advisory Board, after a full hearing, made findings on the very delay for which plaintiff now seeks compensation. Those findings were rightly part of the Board's determination whether or not to grant an extension of time—relief expressly authorized by Articles 4 and 9. As indicated above, these findings, to the extent sanctioned by the administrative record, should be held binding on this court, and *de novo* evidence (directed at the same factual issues) disallowed. If there are other factual issues not covered by the Board's supportable findings, *de novo* evidence should be permitted.

d. *Shield Door Claim*: I agree with the court that plaintiff is barred by its release from now seeking delay damages

on this demand.* The claim made administratively was plainly one under the Changes article (Article 3) and therefore within the Board's competence. I do not concur, however, with the court's disposition of this claim on the ground that there is no allegation of arbitrary or capricious action. This is a formal defect which can easily be cured by amendment. If plaintiff does so amend, I would let the Commissioner decide whether he can adequately review the Board's findings in the absence of the oral testimony, *e.g.*, on the basis of the papers and documentary evidence. If such a review would be insufficient, I would suspend proceedings to give the Atomic Energy Commission a chance to correct the record by reconstructing the previous hearing or by holding a new one (see *United States v. Carlo Bianchi & Co.*, *supra*, 373 U.S. at 717-18).⁷ *Bianchi*, as I read it, precludes any *de novo* judicial trial where the claim is solely under the contract and there have been administrative findings on the merits.

e. *Amercoat Paint Claim*: I agree with the court. To the extent not released,⁸ this claim has been paid.

f. *Delay-Damages Claim*: The Commissioner held that, aside from the matter of the release,⁹ the plaintiff's general claim for delay damages tracked the separate individual claims and should follow their disposition. I agree with this conclusion (as presumably the court does, although the opinion does not mention this phase of the case). The general delay damages claim appears to have no independent status of its own but is a recapitulation of the separate demands.

4. There are two types of *Bianchi*-related issues which this case does not present in its current posture: (a) The extent

* Technically, the question of the release is not now before us on defendant's request for review since the Commissioner decided that point in favor of defendant. Plaintiff did not seek review. In the interests of speedy and orderly disposition of the litigation, however, it seems better to dispose of the issue now, rather than when the case comes before us on the merits or on a motion for partial summary judgment. By failing to appeal from the Commissioner's ruling, plaintiff can be deemed to have accepted at least that part of his decision. There is no suggestion in the briefs that plaintiff is preserving its position on that phase of the case.

⁷ If plaintiff refuses to participate in such renewed administrative proceedings, it should be held to have abandoned the claim. If the Atomic Energy Commission refuses, "the sanction of judgment for the contractor" is available (373 U.S. at 718).

⁸ See footnote 6, *supra*.

⁹ The defense of release is raised by the defendant's motion for partial summary judgment which appears to cover more than the six claims now before us.

to which an administrative determination of factual questions directly related to the interpretation (rather than the application) of the contract provisions is binding in court;¹⁰ and (b) the proper procedure where the contractor, without having pursued administrative remedies under the contract, sues for a breach, while the defendant contends that the claim *could* and *should* have been framed as a demand for administrative relief under some specific clause of the contract. Since *Bianchi*, the court has not decided these questions (and does not do so now), and I continue to reserve my position until the issues must be faced. Cf. *WPO Enterprises, Inc. v. United States*, Ct. Cl., No. 256-59, decided Oct. 11, 1963, slip op., p. 7, 323 F. 2d 874, 878.

¹⁰ This is one aspect of the so-called "fact vs. law" question under the Wunderlich Act.

APPENDIX B

In the United States Court of Claims
(Filed, February 16, 1964)

No. 3-61

UTAH CONSTRUCTION AND MINING COMPANY

v.

THE UNITED STATES

COMMISSIONER'S ORDER AND MEMORANDUM RE APPLICABILITY OF BIANCHI DECISION

In March 1953 the plaintiff was awarded a contract to construct an assembly and maintenance area for the Atomic Energy Commission's National Reactor Testing Station in Idaho for completion a year later. The contract was completed on January 7, 1955, the time having been extended by defendant. Numerous claims were made by the plaintiff during and after contract performance. Some were settled and paid; others were the subject of adverse decisions by the contracting officer and the representative of the head of the department (in one instance a Hearing Examiner and in the other claims the AEC Advisory Board on Contract Appeals). The particular claims presented in the petition which were considered in whole or in part administratively relate to Pier Drilling, Concrete Aggregates, Shield Doors, Shield Windows, and

Amercoat Paint. Another general catchall claim sounding in breach of contract is alleged in paragraph 9 of the petition but was not claimed administratively.

On March 22, 1957, the parties entered into a Receipt and Release under which, in consideration of the payment of \$52,382.92, the plaintiff released the Government from all claims "of whatever kind or character, arising under, in connection with or by virtue of" the contract, with certain enumerated exceptions covering the administrative claims for Shield Windows, Pier Drilling, Shield Door, Concrete Aggregate, and Amercoat Paint.

On June 17, 1963, the undersigned commissioner directed the parties to file briefs to enable him to decide to what extent the case is bound by the decision in *United States v. Bianchi*, 373 U.S. 703 (1963). Briefs were filed by the parties indicating the need for a separate determination as to each of the several claims contained in the petition. In order to ascertain the exact nature of the administrative determinations the commissioner borrowed from the defendant the administrative files in each of the administrative appeals, and examined carefully as to each the contractor's claims and the decisions of both the contracting officer and the AEC on appeal. As a result of such examination, and in consideration of the briefs of the parties, certain conclusions were reached as set forth in the following paragraphs:

PIER DRILLING CLAIM

At the outset of its contract performance the plaintiff ran into float rock in drilling holes in the ground for concrete piers. On June 1, 1953, it notified the contracting officer that it had encountered subsurface conditions materially differing from those indicated in the drawings and specifications. On

February 18 and March 31, 1955, the plaintiff filed its formal claims with the contracting officer, the first requesting payment of the increased drilling costs caused by the changed subsurface conditions, and the second demanding payment of its costs resulting from the delays caused by the subsurface conditions which it alleged postponed the concrete pouring to the winter months. The contracting officer denied both claims, ruling that the rock encountered did not constitute a changed condition and that in any event did not entail the use of any extra drilling equipment which increased plaintiff's costs. The plaintiff appealed to the AEC. After a hearing, the ABCA ruled on April 30, 1957, that the float rock encountered by plaintiff constituted a changed condition and caused a delay in drilling and excavation, but did not cause delays throwing the concrete pouring into winter weather, which situation instead was caused by another dispute over the quality of concrete aggregates purchased by plaintiff from the Government. The record before the Board was not sufficient to determine (1) the increased costs of drilling caused by the changed subsurface conditions, or (2) whether plaintiff was liable to its drilling subcontractor under the terms of the subcontract or otherwise. The Board remanded these questions to the contracting officer for determination.

In its brief to the court the defendant says that, although the plaintiff conferred with the contracting officer subsequent to the remand of the claim by the Board, the plaintiff never undertook further proof of its increased drilling costs, and the contracting officer advised plaintiff that it considered the matter closed in the absence of further proof. The defendant says that plaintiff took no further action administratively, and that therefore the claim should be dis-

missed here for plaintiff's failure to exhaust its administrative remedies. The defendant has submitted copies of the contracting officer's correspondence with plaintiff relating to the remand, and there is no response indicated to the last letter of the contracting officer on July 25, 1958, stating that, following a conference, it was the contracting officer's understanding that plaintiff was not in a position to prove increased costs due to drilling under the Board's criteria.

The net effect of the foregoing recital of administrative proceedings is that *first*, the Board has ratified the decision of the contracting officer that the plaintiff's excavation difficulties at the outset of the contract were not responsible for the delay in pouring concrete in the winter months and the consequent winter protection expenses; and *second*, the plaintiff has failed to exhaust any administrative remedy it might have with reference to the excessive drilling costs it experienced as the result of changed subsurface conditions found by the Board.

The Board had no authority to adjudicate the first element of plaintiff's claim because the relief sought was for the recovery of unliquidated damages for delays allegedly caused by the Government. The Board's sole power under the contract was to adjudicate equitable adjustment for the changed subsurface conditions, and the plaintiff's expenses providing winter protection for the freshly poured concrete could not be paid as part of an equitable adjustment because it was not expended in direct relation to the drilling either in point of time or in function. Since the Board could not adjudicate such a claim, its findings as to the cause of the delay lack the finality accorded by the disputes clause, to findings of fact under the Disputes Clause, for findings made as to facts underlying a claim cognizable only in the courts

are merely advisory. Therefore, in reviewing the decision on this element of the claim the court is not restricted to the administrative record but may receive and consider evidence *de novo*.

As to the remanded part of the claim, the determination of the amount of the excess drilling costs is a matter of fact under the changed conditions clause, but the determination of whether plaintiff can sue in behalf of its subcontractor is a matter of law because it involves a legal interpretation of the subcontract provisions or a legal analysis of any other circumstances which might prevent the subcontractor's recovery from the plaintiff. The plaintiff had to establish both of these propositions in order to recover administratively, and no doubt the agency was ready and willing to pass on them both if the plaintiff had prosecuted its claim to the end, even though strictly speaking the Board had no authority to adjudicate the legal issue with any finality. However, since it is obvious that the Board would have done so, it cannot be said that the plaintiff had no administrative remedy available. Whether or not the agency would entertain such an application after six years of silence by the plaintiff is not for this court to say. If the plaintiff had pursued its claim and persuaded an ultimate decision by the Board that direct drilling costs in a definite amount had been expended but that the plaintiff was not legally liable to its subcontractor and so could not maintain an action in the latter's behalf, finality would attach to the finding as to costs but not as to the liability over to the subcontractor, and the latter question would then be reviewable by the court afresh on any kind of a record the parties offered.

In summary, the plaintiff is entitled to a trial before the court on the question of its delay damages involving the alleged postponement of its concrete pouring to the winter months as a result of its excavation difficulties, and no finality attaches to the adverse decision of the Board on this part of the plaintiff's pier drilling claim. But as to that part of the claim relating to excess costs of drilling the court's action is restricted to a determination of whether the decision below (if any) was arbitrary, capricious, or not supported by substantial evidence in the administrative record.

CONCRETE AGGREGATES CLAIM

The contract involved a large quantity of concrete construction. It provided that the contractor could purchase suitable aggregates from Government supplies or from other sources, but imposed no obligation on the plaintiff to purchase from the Government. The plaintiff elected to purchase aggregates from the Government. Early in the performance period (July 1953) it was discovered that the concrete initially poured was under strength, and that the dirty condition of the aggregate was at least partially responsible. Whereupon, the Government undertook to wash the aggregates to bring them up to specification requirements. While this was being done it directed the plaintiff to increase the strength of the concrete by adding one sack of cement in each cubic yard of concrete mix. This was done for several months until the condition of the aggregates improved to the point that adequate strength was obtained without using the extra sack of cement. Pursuant to plaintiff's request of July 31, 1953, for payment of the extra cement used as a changed condition, and plaintiff's later billing in February 1954 in the amount of

\$8,640.93 for the cost of the extra cement including "supervision, general expense, and profit", the defendant issued Modification No. 6, part of which reimbursed the plaintiff in the amount it had claimed for this item. The contract was completed in January 1955, and it was not until July 1956 that plaintiff filed a claim with the contracting officer for approximately \$109,000 for costs stated to have been incurred because of the poor condition of the aggregates.

The contracting officer rejected the claim on the grounds that it appeared to be one for breach of contract, not properly before him under the Disputes Article, and in the alternative that (1) the claim was untimely, and (2) the plaintiff had failed to explain the nature of the additional costs it was claiming.

The plaintiff duly appealed to the AEC in January 1957 under Article 15 of the contract and requested a hearing.

In March 1957 the plaintiff executed a general receipt and release under which, for \$52,382.92, it released the defendant from all claims "arising under, in connection with or by virtue of" the contract, specifically excepting certain enumerated claims including "Concrete aggregate claim for additional compensation to Contractor".

Under newly inaugurated procedures of the AEC the plaintiff's appeal was assigned to a Hearing Examiner. In May 1959 the contracting officer filed motions to dismiss the appeal proceeding for lack of jurisdiction [i.e., breach of contract], and failure to make timely presentation of claim, and filed a third motion for a more definite statement. A hearing was held before the Hearing Examiner on the motions.

Subsequently the plaintiff filed a brief in opposition to the motions.

On October 1, 1959, the Hearing Examiner filed his decision which contained findings and determinations. The plaintiff's appeal was denied and the contracting officer's motion to dismiss for plaintiff's failure to make a timely presentation of its claim was granted. No hearing on the merits was held. The plaintiff did not petition the AEC for review of the Hearing Examiner's decision as provided in the Rules of Procedure in Contract Appeals (Sec. 330 and 3.31).

The decision of the Hearing Examiner discussed all phases of the appeal, made specific findings of fact, and dismissed the appeal on the stated ground that the claim was not timely. However, the decision also observed that, although plaintiff had based its claim under the Changed Conditions Article, the article was not applicable because the condition of the aggregates was visible on inspection and hence was not an unknown condition. Moreover, if the plaintiff's theory was on breach of warranty of fitness of the aggregates, such a claim would not be within the jurisdiction of the AEC.

It must be concluded that the *Bianchi* decision does not apply to the claim for aggregates, primarily because the decision of the Hearing Examiner of the AEC was predicated upon oral argument of counsel addressed to dispositive motions, and was not based upon a hearing on the merits affording plaintiff an opportunity (as it had requested) to present evidence. Further, the Hearing Examiner disposed of the appeal on the stated ground that the claim was not timely in its presentation, although neither the contract nor any cited regulations prescribe a definite time for the filing of such claims other than the re-

quirement of the Changed Conditions Article that notice of a claim thereunder be given immediately by the contractor. Whether a claim such as the present one, sounding in unliquidated damages, filed one and one-half years after completion of performance under the contract is timely is a question involving the discretionary judgment of this court, assuming that in any event the agency has jurisdiction over such a claim. The contracting officer felt that he had no such jurisdiction because the claim was for unliquidated damages.

If the claim was for unliquidated damages for breach of warranty that the aggregates were suitable and is thus beyond the jurisdiction of the agency, then three consequences ensue to the defendant's position:

(1) No requirement existed that the claim be appealed to the AEC.

(2) The defendant's argument fails that the plaintiff has failed to exhaust its administrative remedy by failing to seek a review by the AEC of the adverse decision of the Hearing Examiner.

(3) There need be no remand to the AEC to hold a hearing on the merits.

It is not specifically mentioned by the defendant in its brief, but in comparable situations the Government has urged that factual decisions by the agency underlying legal decisions over which the agency lacks jurisdiction, nevertheless possess finality on review by this court. In view of the rulings by the court in comparable situations any argument, if made, that the Hearing Examiner's decisions as to the facts possess finality, would not be tenable.

The plaintiff is entitled to a *de novo* trial on the issue of concrete aggregates, and no finality attaches to the AEC decision on this item of the claim.

SHIELD WINDOWS CLAIM

Under the original contract the plaintiff was to install shield windows to be furnished by the defendant. Shield windows were elaborate viewing apertures to permit personnel to watch developments inside specially insulated rooms, without radioactive leakage. They involved special seals and several thicknesses of special glass filled with fluid which would shield radioactive rays but not impede vision. Shortly after the award of the contract a Modification was issued requiring the plaintiff to furnish the shield windows by subcontract with a Government-approved supplier, and a subcontract was let to Corning, which was about the only supplier experienced in this limited field. There is strong indication that during the performance of the contract the Government and its firm of Architect-Engineers had numerous conferences with Corning from which plaintiff was excluded, so that in practical effect (as the ABCA eventually found) Corning was more like a vendor to the Government than a subcontractor to the plaintiff, because of the latter's lack of effective control.

The plaintiff experienced difficulties with the assembling and installation of the shield windows. In June 1954 the plaintiff notified the contracting officer that changed conditions had been encountered materially altering the scope of the work and forcing plaintiff to suspend all operations until the extent of the changed conditions was determined and the contract modified to reflect them. Specifically the changed conditions related to the Koroseal gaskets for the shield windows and the adequacy of the glass in the shield windows supplied by Corning according to specifications. The plaintiff contended that the

design of the Architect-Engineer for the gaskets was faulty and that the defendant's Architect-Engineer was arbitrarily reading into the specifications requirements for selected window shield assemblies not called for by the leading authorities. The contracting officer denied the plaintiff's claim for relief and directed it to proceed, holding in effect that there was nothing wrong with the specifications for the Koroseal gaskets and glass for the shield windows. On July 23, 1954, plaintiff appealed to the AEC and requested a hearing which was held.

On July 23, 1957 the AEC Advisory Board on Contract Appeals (ABCA) rendered its decision on plaintiff's appeal for a time extension, and equitable allowances for additional costs incurred because of the alleged changed conditions (apparently at some interim time the plaintiff had changed the nature of its claim from the form originally presented to the contracting officer). The Board considered the issue to be whether the plans and specifications were adequate to achieve the desired result, assuming the plaintiff's competence. Plaintiff contended that the delays it suffered were not its responsibility but were due in part to the AEC's arbitrary action in bypassing plaintiff and in part to the arbitrary action of the Architect-Engineer and the Corning Glass Company.

At the conclusion of a remarkably thoughtful and sympathetic opinion the Board denied plaintiff's appeal for an equitable adjustment for increased costs but allowed the appeal for an extension of time for excusable delay, and remanded the latter to the contracting officer for computation. The question for remand became moot when the defendant extended the plaintiff's overall time to the actual contract completion date. The Board made a series of specific findings of fact which in effect put the blame for the

series of delays on neither side to the exclusion of the other, and instead held that the delays were chiefly the result of the inherent difficulties of assembling and installing shield doors and windows recognized to be beyond the knowledge and experience of any person or company, and which involved new techniques.

The Board findings enumerated the specific delays which apparently involved a substantial total of lost time. It does not appear in the decision that the plaintiff particularized or even totaled its claim for equitable adjustment, so it cannot be determined from the administrative record what part of its claim would be for direct costs reimbursable under the contract and what part (if any) would be delay damages. Assuming that, the Board would have had no jurisdiction to adjudicate a claim for delay damages (quite apart from the authority of the agency to *settle* such a claim), it is apparent that the basic issue involved in the administrative proceeding was whether the plaintiff was unreasonably delayed by actions of the Government, a typical delay damages type of inquiry sounding in unliquidated damages.

Accordingly, since the final settlement and release entered into on March 22, 1957 reserved plaintiff's claim for "additional compensation" covering the shield windows complaint, it is concluded that the decision of the Board lacks finality, that the *Bianchi* decision does not apply, and that the plaintiff is entitled to a *de novo* trial in this court on the question of delays. It is urged, however, that the parties give full consideration to the possibility of obviating or at least curtailing the trial by adoption of the administrative record, which includes many exhibits and a 453-page transcript of testimony taken during a three-day hearing. It may be that the requirements of the parties as to the facts of the claim may be fully

satisfied in the existing record, and that they would merely want the court to reappraise the evidence *de novo* without any bar of finality to overcome.

Finally, the defendant alleges in its answer that plaintiff has failed to allege that the action of the Board was arbitrary, capricious, etc. Assuming that the Board had no jurisdiction over the type of claim it considered, such allegations in the petition would be superfluous.

SHIELD DOOR CLAIM

On January 28, 1955, the plaintiff submitted a claim of \$4,457.25 to the contracting officer in the form of a proposal for a change order covering extra work on certain shield doors ordered by the Architect-Engineer a year earlier by means of changes made on shop drawings prepared by plaintiff's subcontractor. By a supplemental letter plaintiff asked for a time extension due to the delays involved.

On October 27, 1955, the contracting officer denied the claim on the principal ground that the plaintiff had presented its claim a year late instead of within 10 days, as required by the Changes Article, and on the further ground that the changes made by the Architect-Engineer to the shop drawings did not change the contract drawings and specifications and thus constitute extra work. The plaintiff appealed to the AEC and a hearing was held before the ABCA. Through mistake no reporter was present to transcribe the testimony, but by agreement of the parties this was waived.

The Board made its decision on April 25, 1957, denying plaintiff's claim for adjustment under the changes clause but granting its claim for a time extension, remanding the latter to the contracting officer to determine the amount of the time exten-

sion. As to the major part of the plaintiff's claim the Board held that, while the contract drawings were inexcusably in error, the specifications themselves were adequate, so that the changes made by the Architect-Engineer to the subcontractor's shop drawings did not constitute changes under the changes clause. As to other changes, made by the Architect-Engineer to the subcontractor's shop drawings, the Board held that they did constitute changes to the contract drawings and specifications, but that the plaintiff's failure to present its claim within the 10-day period prescribed by the Changes Article barred any right to recovery, although the contracting officer had the discretion to consider such a claim but was not required to. The Board then remanded the plaintiff's claim for a time extension to the contracting officer to determine the amount.

Three major points are to be made: First, the failure of the Board to prepare a transcript of its hearing prevents an adequate review by the court, and this lack is not cured because the plaintiff may have agreed to having no transcript made. The omission could be corrected by return of the claim to the Board for rehearing, but it is not believed that the *Bianchi* decision requires such a remand in every case where the prospect of even greater delay would be assured. The *Bianchi* decision must be read with discretion, and the Supreme Court's admonition against "delay at its worst" should be given consideration. To return the claim to the Board for a redetermination on the basis of a complete record would add perhaps several more years to the ultimate decision of a claim already 10 years old in its inception.

Second, it is observed that certain aspects of this item of claim might well have been subjected to a

dispositive motion (if seasonably brought), such as the delay in presentation of the claim administratively and possibly the lack of authority of the Architect-Engineer, thus avoiding a trial.

Third, it is noted that at no time did the plaintiff claim administratively anything other than its direct costs, and made no claim for delay damages as it makes for the first time in paragraph 7(c) of its petition. On March 22, 1957, the plaintiff executed a full receipt and release with enumerated exceptions, including "Shield Door Claim for additional compensation to Contractor". In view of the fact that the contracting officer was empowered to *settle* all kinds of claims (whether liquidated or unliquidated, sounding in breach of contract outside or inside the contract), it would seem that the plaintiff's failure to advance such a claim for settlement in the negotiations leading up to the final release would preclude the contractor from advancing it later as an afterthought. It would be a disservice to the contracting officer to permit a contractor to remain silent as to his potential claims while the parties are negotiating a final settlement, and then, after agreement is reached on a supposedly all-inclusive amount, the contractor reveals his new claims. The willingness of the contracting officer to enter into a final payment agreement would necessarily be substantially affected by his knowledge of delay claims, and if the contractor remains silent he is bound by his acceptance of the final settlement by way of accord and satisfaction. The particular reservation which the plaintiff inserted in the release in question would mean to the contracting officer only those direct costs relating to shield doors which the plaintiff had previously placed in issue, and would not include other aspects of the same claim which plaintiff had held quietly in reserve. The

precise situation was present in the recommendations for conclusions of law filed by this commissioner in *Brock & Blevins Company, Inc., v. United States*, No. 292-59, on December 6, 1963, and the reasoning given there is incorporated here by reference.

In short, the plaintiff is entitled to a *de novo* trial on those shield door costs which it claimed administratively, but not as to any collateral delay costs which it advanced subsequent to the execution of the release on March 22, 1957.

AMERCOAT PAINT CLAIM

In March 1954 it was discovered that various metal components furnished by defendant for the "hot shop" required de-rusting and painting with Amercoat. Plaintiff performed this work under protest, contending that it was outside of the painting specifications and involved dismantling, sandblasting, etc. There was some disagreement as to whether Amercoating the shield doors should be considered as part of the plaintiff's obligation to Amercoat the "hot shop" walls. The contracting officer's decision in June 1954 that shield doors were movable walls and thus were contract obligations of plaintiff to paint was reversed in December 1954 by successor Government representatives, and the parties agreed to a settlement formula as to the direct costs of the extra painting. It does not appear that the plaintiff made any administrative claim for delay damages in this connection as it is urging here. The defendant contends that plaintiff was paid in full for this Amercoating claim, and that the only reservation in the release executed by plaintiff in March 1957 was as to an amount withheld but subsequently paid to plaintiff for some defective paint work. The defendant

also says that the present claim for extra work and changed conditions is not relevant to a breach of contract action.

Since the plaintiff did not advance its present claim for delay damages at any time prior to execution of the release in March 1957 and the sole claim reserved in the release was later paid, on the principle of accord and satisfaction the plaintiff should be barred from further recovery. The immediate issue is whether *Bianchi* applies to preclude a *de novo* consideration of the administrative decision, and the above observation as to accord and satisfaction is technically not relevant and should perhaps be the subject of an appropriate motion. However, since the object of the present proceeding is to ascertain what areas of the claim will require trial, it is relevant to rule that, for other reasons, a trial here should be denied and court review be limited to an examination of the administrative record.

DELAY-DAMAGE CLAIM

In paragraph 9 of its petition the plaintiff claims \$1,100,965.23 for defendant's failure throughout the contract to (1) "formulate a desired end-result prior to the award", and (2) "prepare adequate plans and specifications", thereby "imposing additional design and extra work through shop-drawing procedures". It was alleged as part of this claim that the defendant's procedure for approval of shop drawings was slow and compounded the effect of other delays. The allegations made in support of this item of claim, to the extent they can be understood, seem to amount in large part to a catch-all category overlapping to an unknown extent certain parts of the specific claims made administratively as described in other parts of this document. No such claim was made administra-

tively at any time prior to the release executed in March 1957, and none of the exceptions in the release correspond to this claim. The claim itself appears to be one for breach of contract for delays and contemplates unliquidated damages (despite the precision of the amount claimed), so that it would not have been cognizable by the AEC even if it had been presented. But the fact that it had not been presented and was not excepted in the release would make its entertainment in a review proceeding in this court dubious, for reasons given as to other specific claims. This is more properly a subject-matter for a dispositive motion rather than the present determination of the applicability of the *Bianchi* rule. To the extent any of the elements of the claim are duplicated in the specific claims as to which a *de novo* consideration has been recommended, they are not subject to the *Bianchi* rule and trial here should be accorded, but as to the balance presented for the first time in the petition in this case and never presented administratively, no trial should be allowed but a dispositive motion should be entertained.

C. MURRAY BERNHARDT,
Commissioner.

FEBRUARY 18, 1964.

APPENDIX C

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. 321-322) provides:

§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. *Contract-provisions making decisions final on questions of law.*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The contract (Exhibit A to the petition in the Court of Claims) provided in pertinent part:

Article 3. *Changes*

The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or speci-

fications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*

Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 9. *Delays—Damages.*

If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government make take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day or delay until the work is completed or accepted the amount as set forth in the specifications of accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another

contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

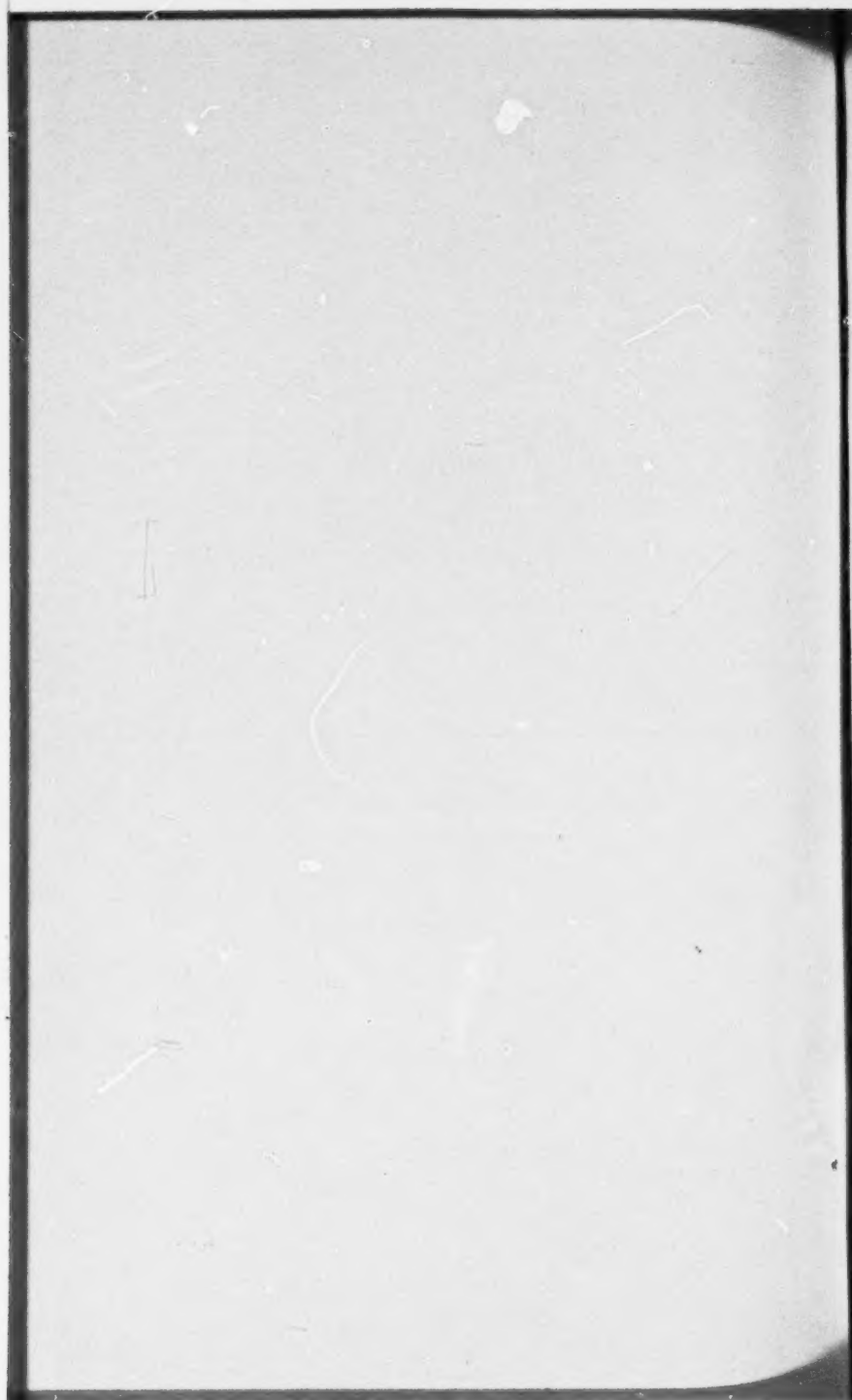
Article 15. *Disputes.*

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

GC-25. *Suspension of work.*

The Commission may by written order direct the Contractor to suspend all or any part of the work for such period of time as may be determined by the Commission to be necessary or desirable for the convenience of the Govern-

ment. If such suspension delays the progress of the work and causes additional expense or loss to the Contractor in the performance of the work, not due to the fault or negligence of the Contractor, the Commission shall make an equitable adjustment in the contract price and time of performance and modify the contract accordingly: *Provided, however*, that no adjustment will be made under this article for suspensions ordered under any other article of the contract or provision of the specifications; and *provided further*, that any claim for adjustment hereunder must be asserted within 30 days from the date such suspension is ordered. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in the article of this contract entitled "Disputes".



Subject Index

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory and contractual provisions involved	3
Statement of the case	3
1. Nature of the controversy	3
2. The administrative claims and proceedings	3
3. The proceedings in the Court of Claims	7
Summary of argument	7
Argument	8
A. This court may not make a review of the opinion below in this case because such would be an improper assumption of original jurisdiction	8
B. Assuming arguendo that this court may take jurisdiction of the case below under 28 U.S.C. 1255(1) such a taking would not be a sound exercise of judicial discretion for the reasons that (1) the opinion below followed the rule of <i>United States v. Carlo Bianchi</i> , 373 U.S. 709, (2) there is no inconsistency or conflict between the rulings of this court and the Court of Claims, and (3) the writ would be premature and would interrupt the decisional process of the Court of Claims	13
1. The Court of Claims followed this court's ruling in the <i>Bianchi</i> case	13
2. There is no conflict or inconsistency between the opinion below and other rulings of this court or of the courts of appeals	16
3. Review of the decision below would be premature and would interrupt the decisional process of the Court of Claims	18

	Page
C. The Court of Claims has properly ruled the action below to be for breach of contract and it may take evidence de novo according to its own rules and procedures as to the order and manner of proof; the contention of the government, that all actions connected with contract—whatever the nature of the action—must be decided upon the factual findings of the agency board, is erroneous and unsound governmental policy	19
1. The Contractor's action is for breach of contract ..	19
2. The contention of the government that all actions connected with the contract—whatever the nature of the action—must be decided upon the factual findings of the agency board is erroneous and unsound governmental policy	25
Conclusion	26

Table of Authorities Cited

Cases and Decisions:	Pages
Allied Paint and Color Works v. United States, 309 F.2d 133	18
American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372	9
Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 64, Findings of Fact and Recom- mendation	21
Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 76, Findings of Fact and Recom- mendation, pp. 18-19	5
Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 87, Findings of Fact and Recom- mendation, p. 11	5
Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 91, Findings of Fact and Recom- mendation	15, 21
Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 95, Findings of Fact and Recom- mendation, p. 6	6
Atomic Energy Commission, Decision of Hearing Examiner, Docket No. 121, p. 12	25
Montgomery Ward v. Collins Estate Inc. (CASC 1956) 237 F.2d 253	12
Silverman Bros. v. United States, 324 F.2d 287.....	18
United States v. Caltex, 344 U.S. 149.....	9
United States v. Carlo Bianchi, 373 U.S. 709.....	7, 13, 17, 18
United States v. Central Eureka Mining Co., 357 U.S. 155	9
United States v. Hamden Co-operative Creamery, 297 F.2d 130	17
United States v. Johnston, 268 U.S. 220, 227.....	16
United States v. Peter Kiewit Sons' Co. (C.A. 8) 345 F.2d 879 (1965)	16

TABLE OF AUTHORITIES CITED

Rules of Court:		Pages
Revised Rules of the Supreme Court of the United States:		
Rule 19(2)		9
Rules of the Court of Claims (Revised 1964):		
Rule 57		10
Rule 66		10
 Statutes:		
28 USC 1254		8
28 USC 1254(1)		3
28 USC 1255		8, 9
28 USC 1255(1)		2, 3, 7, 9, 13
The Wunderlich Act, 68 Stat. 81, 41 USC 231-232		25
 Texts and Miscellany:		
Brief of the Contracting Officer on Motion to Dismiss for Lack of Jurisdiction, Docket No. 121, AEC Hearing Examiner for Contract Appeals		24
Corpus Juris Secundum, Volume 47, page 85		11
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Section 227, n. 1 (Wolfson and Kirkham)		8

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1965

No. 440

UNITED STATES OF AMERICA,

Petitioner,

vs.

UTAH CONSTRUCTION AND MINING Co.,

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Claims**

OPINION BELOW

Petitioner seeks to review the decision of the United States Court of Claims, entered on December 11, 1964, and reported at 339 F. 2d 606. That decision was given upon the Government's request for review of a commissioner's order in the nature of a pre-trial ruling. The commissioner's memorandum decision is unreported

but is contained in the Government's Petition as Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Section 1255(1). For reasons hereafter given, respondent respectfully submits that petitioner is not entitled to invoke such jurisdiction, both because the review would be an improper assumption of original jurisdiction, and because the review would not be a sound exercise of judicial discretion.

QUESTIONS PRESENTED

A. May this Court take jurisdiction under 28 U.S.C. Section 1255(1) when such a taking would be an improper assumption of original jurisdiction?

B. May this Court take jurisdiction under 28 U.S.C. Section 1255(1) when such a taking would not be a sound exercise of judicial discretion?

C. May the Court of Claims take evidence *de novo*, according to its own rules and procedures as to the order and manner of proof, in an action in that court for breach of contract, or must all actions connected with the contract—whatever the nature of the claim—be decided only upon the factual findings of the agency board?

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

Respondent's argument against granting the writ is concerned with the following:

Contract Article 15;

28 U.S.C. 1254(1);

28 U.S.C. 1255(1).

STATEMENT OF THE CASE

1. Nature of the controversy.

This case arose out of a contract between the United States acting through the Atomic Energy Commission ("petitioner" or "the Government"), and Utah Construction and Mining Co. ("Utah" or "the contractor"). The work called for the construction of an aircraft nuclear propulsion assembly and maintenance facility in Idaho.

During the performance of the work Utah incurred increased costs and delays, and claims upon certain phases of the work were made pursuant to the provisions of the contract (especially Article 15, the Standard Disputes Clause). Because the relief granted by the AEC Advisory Board of Contract Appeals was unsatisfactory and incomplete, and because that board lacked authority to consider Utah's contention in its true nature, the contractor brought the action below in the Court of Claims.

2. The Administrative Claims and Proceedings.

The case now before the Court of Claims is not a severable restatement of the separate claims made before the administrative board. The petition of the contractor

states one single, cumulative claim for damages for breach of contract, based, *in part*, upon those major phases of the work which also were presented in some instances as claims under the disputes procedure; to the extent that the Court of Claims Commissioner and the Government may have stated the contractor's action otherwise, they have misread the petition in the Court of Claims.

Therefore, while that which transpired administratively as to the so-called "Shield Window claim" (or any of the other individual claims) may be relevant to an action on breach of a contract involving the installation of Shield Windows, it is not conclusive of the matter considered as a question of breach rather than performance under the contract and specifications.

Certain of the alleged factual statements of the Government's Petition need qualification:

(1) The discussion of the "shield window claim," page 5 of the Petition, is absolutely misleading. The statement attributed to the board that Utah "simply did not know how to do the job" is out of context and grossly unfair in its implication.

What the board did say (in discussion, not in its Findings of Fact) was:

"It is well conceivable that the difficulties encountered by Utah arose in large part, if not in all, from its inexperience and from its workmanship. In other words, the conclusion can be drawn that Utah simply did not know how to do the job. *However, the Board is not convinced that anyone else knew how to do the job either, including Corning (the window fabricator), the Architect-Engineer, or the government,*

prior to the knowledge painfully acquired on the job." (United States Atomic Energy Commission, Advisory Board on Contract Appeals, Docket No. 76, Findings of Fact and Recommendation, pp. 18-19; emphasis added.)

On the other hand Finding of Fact No. 12 states:

"The delays encountered, as set forth in Finding No. 6, were due to unforeseeable causes beyond the control and without the fault or negligence of Utah and resulted in delay of completion for a period of time extending until after November 2, 1965."

Finding No. 7: "Utah exercised the best workmanship and ability which it was capable of producing."

(2) The Government's statement as to the "pier drilling claim" (see Petition, page 5) is incomplete. The Board found (Ruling No. 11), Docket No. 87, Findings of Fact and Recommendation of the Advisory Board on Contract Appeals) that some delay was caused in the drilling by faulty specifications but that this did not *proximately cause* delay in the final work because of other disputes as to concrete aggregate. Such a finding on a question of law is beyond the Board's authority and is made even more inappropriate by the Board's admission that the concrete aggregate dispute was not before it. (See Findings, *ibid.* p. 13.)

Accordingly, Utah is entitled to a determination in the Court of Claims as to the cumulative effect of these delays and errors by the Government, and a proper judicial determination on the question of proximate causation, unhampered by the limitations imposed upon individual claim presentation under the administrative procedure.

(3) On the "shield door" phase of the work the important consideration is not whether the specific claim based on that phase of the work was timely filed or was released, but whether, upon a consideration of all the facts, the failure of the Government to properly design this phase contributed to the breach of contract. The Board said:

"There is no question but that the *bidding documents with respect to the immediate problem were inadequate*, although the specifications did indicate to the contractor in sufficient detail the nature of the equipment it would have to house." (Findings of Fact & Recommendation, Advisory Board of Contract Appeals, Docket 95, page 6.) (Emphasis added.)

The Board then went on to shift the burden for faulty plans onto Utah, saying it should have recognized the problem, and should have objected.

(4) The Government's characterization of the facts surrounding the "concrete aggregate" phase of the project fails to point out a matter important to a breach of contract action. The contracting officer had ruled that Utah's claim for costs for delay due to the poor and dirty condition of concrete aggregate was one for breach of contract and so beyond his authority under the "disputes" clause.

The Hearing Examiner, however, simply ruled the claim untimely and so did not meet the issue of breach, nor of course did he consider the cumulative effect of the facts of breach relative to the other claims.

3. The Proceedings in the Court of Claims.

At this point Utah's contention should be clear. A single and cumulative claim is alleged, and it is based upon a breach of contract resulting from the delays, misrepresentations and failures to perform on the part of the Government, including those occurring upon the major phases of the project which also were the subject of specific administrative claims.

SUMMARY OF ARGUMENT

- A. This Court May Not Take Jurisdiction of This Case Because Such Would be an Improper Assumption of Original Jurisdiction. The Opinion Below is a Ruling of the Court of Claims Which is Neither a Final Decision nor an Interlocutory Order as to Which Review May be Properly Taken.
- B. Assuming Arguendo That This Court May Take Jurisdiction of the Case Below Under 28 USC 1255(1) Such a Taking Would Not be a Sound Exercise of Judicial Discretion for the Reasons That: (1) The Opinion Below Followed the Rule of *United States v. Carlo Bianchi*, 373 US 709, (2) There is no Inconsistency or Conflict Between the Rulings of This Court and the Court of Claims, and (3) the Writ would be Premature and Would interrupt the Decisional Process of the Court of Claims.
- C. The Court of Claims has Properly Ruled the Action Below to be for Breach of Contract and it May Take Evidence *de Novo* According to its Own Rules and

Procedures as to the Order and Manner of Proof; the Contention of the Government, That All Actions Connected With Contract—Whatever the Nature of the Action—Must be Decided Upon the Factual Findings of the Agency Board, is Erroneous and Unsound Governmental Policy.

1. The Action pleaded by the contractor in the Court of Claims is for breach of contract, and is not dependent upon the individual claims heard by agency boards as to certain phases of the work.
2. The contention of the Government that all actions connected with the contract—whatever the nature of the action—must be decided upon the factual findings of the agency board, is erroneous and unsound governmental policy.

ARGUMENT

A. THIS COURT MAY NOT MAKE A REVIEW OF THE OPINION BELOW IN THIS CASE BECAUSE SUCH WOULD BE AN IMPROPER ASSUMPTION OF ORIGINAL JURISDICTION.

Unlike 28 U.S.C. Section 1254 there is no provision in 28 U.S.C. Section 1255 for certiorari "before or after judgment or decree." It is respectfully submitted that the issuance of a Writ of Certiorari as to the case below in its present posture would constitute an assumption of original jurisdiction not contemplated by the Constitution of the United States for the reason that there has been no judgment or decree by the Court of Claims.¹

¹See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Section 227, n. 1 (Wolfson and Kirkham ed. 1951).

Petitioner admits that the order below "... is not a final judgment granting or denying relief. . . ." (Petition, page 2, n. 1), but attempts to justify its invocation of jurisdiction by claiming that the order below was interlocutory, and that review by this Court under 28 U.S.C. 1255(1) is "unrestricted."²

There are decisions of this Court referring to the alleged power to review interlocutory orders, including those cited by petitioner.³ In every instance, however, the "interlocutory" order in fact was a *judgment for one of the parties* which was only denied "finality" pending an accounting or another necessary finding.

The present order below simply makes certain rulings as to the law of the case which are to be followed by the

²Petitioner's reference to the Reviser's Notes on 28 U.S.C. 1255 (see Petition, p. 2, n. 1) is incomplete and misleading. The Reviser was referring to the scope of the review upon certiorari when properly granted. The complete Reviser's note makes the distinction in meaning clear:

"The provision of subsection (a) of said section 288, for review and determination of all errors assigned, 'with the same power and authority and with like effect, as if the cause had been brought there by appeal,' was omitted as unnecessary. Review under this section is unrestricted."

In fact, as this Court has held, review under 28 U.S.C. 1255(1) is subject to the general rules applied to review of courts of appeals and to the policy statement set forth above as to non-final actions. (See Rule 19(2), Revised Rules of the Supreme Court of the United States.)

³Both *United States v. Caltex*, 344 U.S. 149, and *United States v. Central Eureka Mining Co.*, 357 U.S. 155, involved review by this Court after a Judgment for one of the parties.

This Court has repeatedly stated that certiorari to review a non-final action, such as one remanding a case to the district court for a new trial, should be refused in the absence of some exceptional reason. In *American Construction Co. v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, at 384 this Court so held, "... unless it is necessary to prevent extraordinary inconvenience and embarrassment in the case."

Commissioner in preparing his report to the Court of Claims. This is not an "interlocutory order" which finally determines any rights of the parties. The ruling was that the Commissioner should proceed to take evidence only insofar as Utah can go forward with a showing of a breach of contract and can show a remedy which was not available administratively.

Under the rules of the Court of Claims the Commissioner is charged with making findings upon the taking of evidence and shall report these findings and his recommendations for conclusions of law to the Court of Claims. (See Rule 57, Rules of the Court of Claims, Revised 1964.)

Pursuant to the foregoing rules, the Commissioner takes evidence and makes interim decisions and orders. The order now challenged is but one of a series of such rulings and will hardly be the last before his report is eventually made to the court.

After the Commissioner has made his report the Court of Claims will rule upon the case. Rule 66 of the Rules of the Court of Claims establishes the procedural nature of the Commission's ruling which is herein considered.

Upon each of the Commissioner's rulings as to what areas of the action might require evidence *de novo* the opinion below clearly indicated the non-final, non-decisional effect of those rulings. For example, as to the phase of the work involving shield windows, the Court of Claims stated:

"It appears that the board over a period of 3 days heard testimony with respect to this claim, including

the claim for delays, and that the transcript of this testimony runs to 453 pages, and that many exhibits were filed; hence, the commissioner suggests that the parties might well agree to stand on this record, with permission to supplement it with respect to the delay claim to such extent as they think proper. Certainly the parties ought to desist from duplicating the administrative record *but, insofar as the claim relates to damages for unreasonable delay, the parties are not foreclosed by it nor from supplementing it, if they wish.* (Emphasis added.) (Opinion below, See Government's Petition, App. A, p. 29.)

And:

"If this claim be one for breach of contract, as our commissioner supposes, we have jurisdiction to determine it and to receive evidence *de novo*.

"However, assuming the claim is not for breach of contract, we cannot agree with the commissioner that the failure of the board to consider the case on its merits gives plaintiff the right to introduce evidence *de novo* in this court. If we decide the board should have considered the claim on its merits, we should suggest to the board that it consider it on the merits and suspend proceedings here until it has had a reasonable opportunity to do so." (Id. at 28.)

How much more plainly could the court state that the ruling now under attack, and even the Commissioner's report, are not finally determinative of the rights of the parties?

The Rules of the Court of Claims do not define an interlocutory order. Corpus Juris Secundum, Vol. 47, Page 85 says it is:

“Something intervening between the commencement and the end of a suit which decides some point or matter, but which is not a final decision of the whole controversy.”

But even if the opinion below can be dubbed interlocutory in the general sense, it is certainly unlike the cases cited by the Government in n. 1, Page 2 of the Petition. The opinion below is more like the situation in *Montgomery Ward & Co. v. Collins Estate Inc.* (CASC 1956) 237 F.2d 253, wherein the court held that an order in an action at law giving answers to certain basic questions involved in a controversy between parties, and referring the case to a special referee to hear evidence and state an account between the parties in accordance with the law as laid down in such order, was not a final order in the cause and was not within the class of interlocutory orders from which an appeal is allowed.

Accordingly, we respectfully submit this Court may not take jurisdiction of the case in its present posture by Writ of Certiorari.

B. ASSUMING ARGUENDO THAT THIS COURT MAY TAKE JURISDICTION OF THE CASE BELOW UNDER 28 U.S.C. 1255(1) SUCH A TAKING WOULD NOT BE A SOUND EXERCISE OF JUDICIAL DISCRETION FOR THE REASONS THAT (1) THE OPINION BELOW FOLLOWED THE RULE OF UNITED STATES v. CARLO BIANCHI, 373 U.S. 709, (2) THERE IS NO INCONSISTENCY OR CONFLICT BETWEEN THE RULINGS OF THIS COURT AND THE COURT OF CLAIMS, AND (3) THE WRIT WOULD BE PREMATURE AND WOULD INTERRUPT THE DECISIONAL PROCESS OF THE COURT OF CLAIMS.

1. The Court of Claims followed this Court's ruling in the Bianchi case.

Review is here sought of an order affirming and amending in part the Court of Claims Commissioner's ruling on what areas of the claim require trial. The Court of Claims held that the findings of fact of the Contracting Officer and the Board of Contract Appeals are not final because the action is not a dispute arising under the contract.

This decision that the action is not subject to the "disputes" clause of the contract was reached after the parties had submitted briefs to the Commissioner, after judicious consideration of the specific facts of the case and the application of the *Bianchi* decision by the Commissioner, and after submission of briefs and upon oral argument by the parties before the Court of Claims itself.

In holding this case to be one for breach of contract, and not one arising under the contract, and accordingly not subject to the *Bianchi* doctrine of limited review, the Court of Claims carefully followed the direction of this Court. In response to the Government's argument that the *Bianchi* rule was being ignored, the Court of Claims said (339 F.2d 606 at p. 609):

“Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to ‘disputes concerning questions of fact *arising under this contract.*’ This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract.”

The following conclusion (after which the Court of Claims made general rulings as to each of the phases of the breach of contract action), is important:

“But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute ‘*arising under the contract.*’ It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive.

“In any case we would so construe the contract between the parties, but in this case there is a compelling reason to strictly limit the contract to its precise terms. It is well known that anyone seeking a contract with the Government must be willing to

agree to accept the contract drawn by the Government; indeed, the advertisement for bids so stipulates. These contracts all contain this 'disputes' clause, which makes the arbiter of the dispute in the first instance the contracting officer, who is the Government's servant and employee, and whose prime duty is to be diligent in the protection of the Government's interests and to require that the contractor strictly comply with the terms of the contract. The transition from such a role to that of an impartial arbiter in the settlement of a dispute between himself, or his representative, and the contractor would seem to be somewhat difficult. An appeal from the findings and decision of the contracting officer is allowed to the head of the department, but he, too, is an officer of the Government, the opposite contracting party. This is an additional and a cogent reason for limiting this provision of the contract to its precise terms. See *Langevin v. United States, supra*; *B-W Construction Co. v. United States, supra*; and *Miller, Inc. v. United States, supra*.

"The Atomic Energy Commission's advisory Board of Contract Appeals in the Appeal of *Utah Construction Company* (Docket No. 91) recognized its lack of jurisdiction to decide or to make findings concerning damages for breach of contract. It said:

It is clear, in the light of the Board's decision in Appeal of *Claremont Construction Company* (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract. The Board has discussed this distinction at length in both that *Claremont* case and in Appeal of *Frontier Drilling Company* (Docket No. 74).

The reasoning need not be repeated here. As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.

"In conclusion, we hold that in a suit for breach of contract we are not bound by a finding of fact of the Board of Contract Appeals even though that finding is relevant to 'a dispute arising under the contract.' " (See Petition, Appendix A, pp. 25-26.)

2. **There is no conflict or inconsistency between the opinion below and other rulings of this Court or of the courts of appeals.**

A distinction can and should be drawn between disputes "arising under" the contract and that sort of omission or commission which constitutes an actual breach of contract.

There is no conflict in the cases cited by the petitioner such as to warrant review by this Court upon a theory of conflicting decisions in the Federal courts. Those cases which were decided before this Court's *Bianchi* ruling are even less indicative of conflict. This Court has consistently denied certiorari to review evidence and discuss specific facts. (See *United States v. Johnston*, 268 U.S. 220, 227.)

In the main case cited by petitioner, *United States v. Peter Kiewit Sons' Co.* (C.A. 8) 345 F.2d 879 (1965), the District Court ruled that Kiewit could elect to sue in tort or in contract; further, that the tortfeasor was within the "loaned servant" doctrine and his negligence was imputed to the Government.

Speaking for the Court of Appeals Judge Vogel said:

"It [the District Court] did not hold that the claim was not a dispute arising under the contract involv-

ing a question of fact, but held that Kiewit was 'free to treat the claim either as one sounding in tort or contract.' " (345 F.2d 829, 881.)

The Court of Appeals then held, entirely consonant with the *Bianchi* rule (though not citing the case), that Kiewit's claim was one arising under the contract and he was confined to resolution by administrative proceeding.

In other words, the Court of Appeals found *upon the specific facts of that case* that the claim arose under the contract and the parties were restricted to an action upon the contract. Judge Vogel was very careful to delineate that the claim was so characterized *and noted the particularity with which the parties had contemplated such a dispute in making their contract.*

The fact that Kiewit contended that the claim was for breach and not arising under the contract should surprise no one, and it does not create a conflict in the decisions. What is important is the characterization given the claim by the court. We could take issue with much of Judge Vogel's opinion but that case is not questioned here; whether or not the *Kiewit* decision deserves review, it does not establish conflict either with this case or *United States v. Bianchi*.

The remaining cases cited by petitioner under this subject head (pp. 13-14 of the Petition) are merely additional illustrations of the court's efforts to properly characterize the claim. In *United States v. Hamden Co-operative Creamery*, 297 F.2d 130, a summary judgment in the trial court was affirmed for the Government on the question of

sub-standard milk; in *Silverman Bros. v. U.S.*, 324 F.2d 287 the court relied on *Bianchi* to find the contractor had terminated his supply contract in violation of the contract provisions for default; and in *Allied Paint and Color Works v. United States*, 309 F.2d 133, the court held there was no breach but rather that pursuant to contractual risk of loss provisions the Government had fulfilled its contract. *The Allied decision recognized, however, that there would be situations where a trial de novo would be necessary.*

It is all very well to pick at individual decisions and to wish for a neat rule for review of all of the decisions of contracting officers and Boards, but unless this Court intends to either (1) have review of every inferior court determination as to what is subject to the "disputes" clause, or (2) make the contracting officer and the Board the final judges of ultimate questions of all contract rights as well as disputes over specifications, the Court of Claims and courts below should be allowed a reasonable opportunity to work out principles of law and review of disputes within the outlines laid down by this Court in *Bianchi*.

3 Review of the decision below would be premature and would interrupt the decisional process of the Court of Claims.

Earlier, in Part A of this argument, we set forth that the opinion below is a conditional ruling as to the procedures to be followed by the Court of Claims Commissioner; the rules of that Court are clear that it may modify or reject the report of the Commissioner which will be filed subsequent to the trial. *In effect there has*

been no "decision" by the Court on the issues of which the Government complains.

Review at this stage of the case cannot accomplish the far-reaching desires of the Government because there has been no decision by the Court of Claims upon which this Court could expostulate such a sweeping expansion of the review doctrine. In accord with its rules the Court of Claims could modify or completely revise the findings of its Commissioner. To interrupt the proceedings at this point would be a clear invasion of the prerogative of that court.

C. THE COURT OF CLAIMS HAS PROPERLY RULED THE ACTION BELOW TO BE FOR BREACH OF CONTRACT AND IT MAY TAKE EVIDENCE DE NOVO ACCORDING TO ITS OWN RULES AND PROCEDURES AS TO THE ORDER AND MANNER OF PROOF; THE CONTENTION OF THE GOVERNMENT, THAT ALL ACTIONS CONNECTED WITH CONTRACT—WHATEVER THE NATURE OF THE ACTION—MUST BE DECIDED UPON THE FACTUAL FINDINGS OF THE AGENCY BOARD, IS ERRONEOUS AND UNSOUND GOVERNMENTAL POLICY.

1. The Contractor's action is for breach of contract.

The claim of Utah Construction and Mining Co. is that the United States breached the contract between the parties and should respond in damages. It is a single, cumulative claim for breach of contract made up of a series of items. In considering whether the Court of Claims has reasonably held the claim to be outside of the disputes clause, it is necessary to consider certain allegations in the contractor's original Petition to the Court of Claims. The charging allegations are contained in paragraphs 4 and 6 of that petition.

The items of the contract which involved the majority of defendant's acts and omissions constituting breach are set out in paragraph 7 of Utah's Petition. These aspects are the so-called "claims." *It must be emphasized here that these items of the work are not urged by Utah as separate claims or as a series of breaches of the contract, despite the possible implication of the Court of Claims Commissioner to the contrary.* It is no answer to Utah's petition to say that an administrative claim has or has not been pressed as to some or all of these items. As is clearly stated in Utah's petition to the Court of Claims:

"[It is] the acts of defendant with respect to major phases of said contract, hereinafter referred to, which independently and cumulatively constituted a breach of contract by defendant . . ." (Petition, paragraph No. 6.)

This is a distinction of the first magnitude and will of course be made clear to the Court of Claims at the time of the Commissioner's Pretrial Order. In fact much of the so-called "fact and law confusion" will be cleared up after the issues have been developed in proceedings before the Commissioner.

Bearing in mind that the contractor's Petition states a single claim for breach of contract, it must also be remembered that the administrative agencies, including the Atomic Energy Commission's Advisory Board on Contract Appeals, uniformly recognized and enforced the distinction between disputes "arising under" the contract and those disputes "relating to" the contract.

The records demonstrate that, during its brief lifetime, the Atomic Energy Commission's Advisory Board on

Contract Appeals uniformly held that claims for damages for breach of contract or delay-damages were beyond its jurisdiction and need not be presented to it. This decisional policy was as we have pointed out, consistent with the practice of all of the governmental Contract Appeals Boards.

For instance, in at least one controversy involving directly the contract which is the subject of the present litigation, the Board made such a ruling. The decision referred to is the one entitled *Appeal of the Utah Construction Company* (Docket No. 91) where the Board stated:

"It is clear, in the light of the Board's decision in Appeal of Claremont Construction Company (Docket No. 64), that, not only does the *Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract.* The Board has discussed this distinction at length in both that Claremont case and in Appeal of Frontier Drilling Company (Docket No. 74). The reasoning need not be repeated here. *As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.*" (Emphasis added.)

Of course, the identical "disputes" clause was interpreted in that appeal.

The *Claremont* case referred to in the last mentioned decision was a "Findings of Fact and Recommendation" issued by Dean Robert Kingsley on October 20, 1954 in the proceedings entitled Appeal of Claremont Construction Company (Docket No. 64). In that opinion, which

became the leading authority of the A.E.C. Appeals Board on this subject, Dean Kingsley declared:

"The Contractor cites persuasive authority to the effect that, under a contract such as the one herein involved, the Commission's sole remedy was to terminate the contract under Article 9 and determine damages by a re-letting (see *U.S. v. Foley*, 329 U.S. 64; *Crook v. U.S.*, 207 U.S. 4; *U.S. v. Rice*, 317 U.S. 61; *Kelly v. U.S.*, 69 Fed. Supp. 117; 21 S.C. L. Rev. 36). However, the Board is convinced that *this issue is not a dispute that arises 'under' the contract and within the Board's jurisdiction, but rather is a matter of general law to be decided by a suit in the Court of Claims or in the District Court (cf. Appeal of Utah-Leavell, Docket No. 51).*

Although a tentative opinion to the contrary was expressed at the hearing (Trans., pp. 17-20), the Board, on further reflection and with the benefit of briefs, concludes that *it likewise lacks jurisdiction to rule on the correctness of the measure of damages adopted by the Contracting Officer. Since the whole matter of damages (apart from action under Article 9) is outside the express contract language, it follows that the measure of damages is also a question of general law and not a 'dispute . . . under' the contract.*" (Emphasis added.)

It cannot be questioned that the whole course of administrative decisions on the pertinent issue ran directly contrary to the present contention of the Government. It would have been a futile act for a contractor claimant to have attempted to present before the Advisory Board on Contract Appeals of the Atomic Energy Commission a claim admittedly sounding of breach of contract and actionable misrepresentations by the Government.

That the Court of Claims in the opinion below viewed Utah's action as one for breach of contract is indisputable. The holding of the Court of Claims is supported by both the Commissioner's rulings and a myriad of decisions of agency boards and contracting officers.

As to the "pier drilling" phase we recall to the Court's attention the agency board ruling that faulty plans did not *proximately* cause delay to the contractor's work. The Commissioner's Memorandum made this statement as to the breach of contract aspect (see Petition, Appendix B, pp. 42-43):

"The net effect of the foregoing recital of administrative proceedings is that *first*, the Board has ratified the decision of the contracting officer that the plaintiff's excavation difficulties at the outset of the contract were not responsible for the delay in pouring concrete in the winter months and the consequent winter protection expenses; and *second*, the plaintiff has failed to exhaust any administrative remedy it might have with reference to the excessive drilling costs it experienced as the result of changed subsurface conditions found by the Board.

"The Board had no authority to adjudicate the first element of plaintiff's claim because the relief sought was for the recovery of unliquidated damages for delays allegedly caused by the Government. The Board's sole power under the contract was to adjudicate equitable adjustment for the changed subsurface conditions, and the plaintiff's expenses providing winter protection for the freshly poured concrete could not be paid as part of an equitable adjustment because it was not expended in direct relation to the drilling either in point of time or in function. Since the Board could not adjudicate such a claim, its find-

ings as to the cause of the delay lack the finality accorded by the disputes clause, to findings of fact under the Disputes Clause, for findings made as to facts underlying a claim cognizable only in the courts are merely advisory. Therefore, in reviewing the decision on this element of the claim the court is not restricted to the administrative record but may receive and consider evidence *de novo*."

In the hearings on the concrete aggregate phase the contracting officer filed a brief in which he stated:

"Conclusion: The conclusion is compelling that the contractor's claim is *solely* a claim for damages for breach of contract or breach of warranty;"⁴

The Hearing Examiner, in ruling, said:

"The Contracting Officer also contends that the standard changed condition clause applies generally to an unknown underground condition related specifically to the main objective of the work to be accomplished, such as an excavation needed for footings for a building contracted to be constructed. For those situations, however, of conditions that are readily observable the Contracting Officer contends the relief under a changed conditions clause is not available, and while a hearing on the merits might better enable the Contracting Officer to present the factual support for this contention, the disposition of the claim as untimely obviates a determination of that phase of his contention. *Likewise, if Utah argues that the description of the aggregates as 'suitable' implied any warranty as to condition, or fraud in that representation, the remedy for unliquidated damages is beyond the*

⁴Brief of the Contracting Officer on Motion to Dismiss for Lack of Jurisdiction, Docket No. 121 AEC Hearing Examiner for Contract Appeals.

jurisdiction of this proceeding." (Hearing Officer's Decision dated October 1, 1959, Docket No. CA-121, p. 12.)

Of course, that is the very contention of Utah in the case before the Court of Claims. See Petition, U.S. Court of Claims, No. 3-61, pp. 5, 8, 18.

2. The contention of the government that all actions connected with the contract—whatever the nature of the action—must be decided upon the factual findings of the agency board is erroneous and unsound governmental policy.

This contention of the Government goes far beyond the holding in the *Bianchi* case, it is beyond the intent of the Wunderlich Act, and beyond any reasonable interpretation of the standard "disputes" clause in Government contracts.

This sweeping attempt to interpret plain language is not supported by any reference to the express words that support it, or to any legal authority suggesting such an interpretation.

As the majority opinion of the Court of Claims pointed out:

"... No statute gives the contracting officer and the head of the department, or his representative, authority to decide the rights of the parties to a Government contract; their authority is derived solely from the contract between the parties.

"... [T]he board's authority is limited to disputes 'concerning questions of fact arising under this contract.' ... The parties did not contract that *their findings of fact should be conclusive in suits for breach of contract.*" (Emphasis in the original.) (See Government's Petition, App. A, p. 23.)

Utah Construction and Mining Company never agreed, in the pertinent contract or otherwise, to permit any Government representative (whether contracting officer, agency contract appeals board, or Department of Justice official) to decide all questions of fact arising under its contract. Furthermore, under the contract procedures it only agreed to have individual items of dispute determined one by one. Neither party to the contract ever contemplated or referred to any right of a Government representative to determine an overall, cumulative action for breach of the contract.

This claim of the Government goes far beyond anything that even its own advocates have ever contended for in the long history of litigation over Government contracts. Its contention stands without the slightest bit of respectable authority or convincing reason. It should not, we respectfully submit, be dignified by gaining the attention of this Court by way of a writ of certiorari.

CONCLUSION

For the reasons presented in this brief the Supreme Court does not have jurisdiction to review this case in its present posture. But in any event, the writ would be premature at this time.

The Court of Claims has properly ruled that the claim of Utah Construction and Mining Co. is beyond the scope of the standard "disputes" clause. The claim is presented upon a theory of relief which was not available administratively. It must therefore be considered as an original

matter and the Court of Claims should be allowed to preside over the order and manner of proof and the taking of evidence.

For the foregoing reasons the petition for a writ of certiorari to the Court of Claims should be denied.

Dated, San Francisco, California,

October 5, 1965.

Respectfully submitted,

GARDINER JOHNSON,

THOMAS E. STANTON, JR.,

Counsel for Respondent.

JOHNSON & STANTON,

RONALD LARSON,

Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutory and contract provisions involved	2
Statement	6
1. Background	6
2. Administrative claims and proceedings	7
3. Proceedings in the Court of Claims	11
Argument	15
Introduction and Summary	15
I. Factual issues once administratively resolved pursuant to the standard disputes clause of government contracts may not be tried <i>de novo</i> by the court	19
II. Factual issues underlying claims for breach of contract are disputes arising under the contract within the standard disputes clause of government contracts, at least insofar as the factual issues are of the kind clearly committed to administrative determination by the contract	27
Conclusion	54

CITATIONS

Cases:

<i>Allied Paint & Color Works v. United States</i> , 309 F. 2d 133, certiorari denied, 375 U.S. 813	27
<i>American Well Works v. Lane & Bowler Co.</i> , 241 U.S. 257	30
<i>B-W Construction Co. v. United States</i> , 101 Ct. Cl. 748, 60 F. Supp. 771, reversed on other grounds, <i>sub nom. United States v. Beutlas</i> , <i>et al.</i> , 324 U.S. 768	42, 43

II

Cases—Continued

	Page
<i>Cannon Construction Company v. United States</i> , 319 F. 2d 173.....	43, 52
<i>Carlo Bianchi & Co. v. United States</i> , 144 Ct. Cl. 500, 169 F. Supp. 514.....	40
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541.....	2
<i>Continental Illinois Nat. Bank & Trust Co., v.</i> <i>United States</i> , 121 Ct. Cl. 203, 101 F. Supp. 755, certiorari denied, 343 U.S. 963.....	32
<i>Continental Illinois Nat. Bank & Trust Co. v.</i> <i>United States</i> , 126 Ct. Cl. 631, 115 F. Supp. 892.....	34, 51
<i>William Cramp & Sons v. United States</i> , 216 U.S. 494.....	51
<i>Crook v. United States</i> , 270 U.S. 4.....	45
<i>Fuller v. United States</i> , 108 Ct. Cl. 70, 69 F. Supp. 409.....	46
<i>Gully v. First National Bank</i> , 229 U.S. 109.....	30
<i>Gillespie v. United States Steel Corp.</i> , 379 U.S. 148.....	2
<i>Kehm Corp. v. United States</i> , 119 Ct. Cl. 454, 93 F. Supp. 620.....	46
<i>Langevin v. United States</i> , 100 Ct. Cl. 15.....	34, 41, 42, 43
<i>Marconi Wireless Co. v. United States</i> , 320 U.S. 1.....	2
<i>Anthony P. Miller, Inc. v. United States</i> , 111 Ct. Cl. 252, 77 F. Supp. 209.....	34, 50
<i>Morrison-Knudsen Co. v. United States</i> , 345 F. 2d 833.....	31, 43, 48
<i>Palumbo v. United States</i> , 125 Ct. Cl. 678, 113 F. Supp. 450.....	35
<i>Peyton v. Railway Express Agency</i> , 316 U.S. 350.....	30
<i>Phoenix Bridge Co. v. United States</i> , 85 Ct. Cl. 603.....	42

III

Cases—Continued

	Page
<i>Potashnick v. United States</i> , 123 Ct. Cl. 197, 105 F. Supp. 887.....	31, 35
<i>Saddler v. United States</i> , 152 Ct. Cl. 557, 287 F. 2d 411.....	37
<i>Silverman Bros. v. United States</i> , 324 F. 2d 286..	27, 53
<i>Union Paving Co. v. United States</i> , 126 Ct. Cl. 478.....	35
<i>United States v. Carlo Bianchi & Co.</i> , 373 U.S. 709... 12, 18, 21, 22, 23, 25, 26, 37, 39, 40, 41, 42	
<i>United States v. Blair</i> , 321 U.S. 730, reversing 99 Ct. Cl. 71.....	39, 41, 45
<i>United States v. Callahan Walker Construction Co.</i> , 317 U.S. 56, reversing 95 Ct. Cl. 314..	35, 39, 40
<i>United States v. Caltex, Inc.</i> , 344 U.S. 149.....	2
<i>United States v. Central Eureka Mining Co.</i> , 357 U.S. 155.....	2
<i>United States v. Corliss Steam-Engine Co.</i> , 91 U.S. 321.....	50, 52
<i>United States v. William Cramp & Sons Ship & Engine Building Co.</i> , 206 U.S. 118.....	51, 52
<i>United States v. Craft-Mullins</i> , 383 F. 2d 772..	45
<i>United States v. Foley</i> , 329 U.S. 64.....	45
<i>United States v. Hamden Co-operative Creamery Co.</i> , 297 F. 2d 130.....	27, 53
<i>United States v. Holpuch</i> , 328 U.S. 234.....	32, 33, 39
<i>United States v. Moorman</i> , 113 Ct. Cl. 159, re- versed 338 U.S. 457.....	43
<i>United States v. Peter Kiewit Sons' Co.</i> , 345 F. 2d 879.....	27
<i>United States v. Rice</i> , 317 U.S. 61.....	45
<i>Universal Ecsco Corp. v. United States</i> , 345 F. 2d 586.....	39
<i>Volentine and Littleton v. United States</i> , 136 Ct. Cl. 638, 145 F. Supp. 952.....	40
<i>Volentine and Littleton v. United States</i> , 144 Ct. Cl. 723.....	38

Statutes:

Act of May 11, 1954 (Wunderlich Act), 68 Stat. 81, 41 U.S.C. 321, 322.....	Page 2, 21, 22, 32
5 U.S.C. 124-132.....	54
28 U.S.C. 1331.....	30
28 U.S.C. 1338.....	30
28 U.S.C. 1339.....	30
28 U.S.C. 1340.....	30
31 U.S.C. 71.....	53

Miscellaneous:

Ablard, <i>A Survey of the Boards of Contract Appeal in the Federal Government and their Authority to Decide Contract Disputes</i> , 30 D.C. Bar Ass'n Journal 64 (1963).....	44
Buttindex Corporation, A.S.B.C.A. No. 2162 (February 24, 1956).....	48
Armand Cassil, A.S.B.C.A. No. 438 (June 8, 1950).....	48
10 C.F.R. Part 3 (1965).....	10, 44
32 C.F.R. 8.701-704.....	52
32 C.F.R. 7.105-8.....	52
32 C.F.R. 30.1, Part I, Appendix A (1954)....	47
32 C.F.R. 30.1, Part I, para. 5 (1964 Supp.)..	47
32 C.F.R. 30.1, Appendix A, Part I (1965)....	48
44 Comp. Gen. 353.....	53
Doyle and Russell, Inc., NASA BCA No. 51, 65-2 BCA ¶ 4912.....	49
Executive Order No. 6166, Section 5 (June 10, 1933).....	54
9 Fed. Reg. 9463.....	47
24 Fed. Reg. 726.....	10
Sec. 3.30.....	10
Sec. 3.31.....	10
Fick Foundry Co., AEC BCA No. 10-65, 65-2 BCA ¶ 5052.....	49
H. Rep. No. 1380, 83d Cong., 2d Sess., p. 5..	22, 39

Miscellaneous—Continued

	Page
Leventhal, <i>Public Contracts and Administrative Law</i> , 52 A.B.A.J. 35 (January, 1966) ..	45
<i>The Metrig Corp.</i> , A.S.B.C.A. No. 8455, 1963 BCA ¶ 3658	49
Shedd, <i>Disputes and Appeals: The Armed Services Board of Contract Appeals</i> , 29 Law & Contemp. Probs. 39 (1964)	33, 44, 46, 47
<i>Simmel-Industrie Meccaniche Societa per Azioni</i> , A.S.B.C.A. No. 6141, 61-1 BCA ¶ 2917 (1961)	48

- 45 Essential, Public Contracts and Administration
the Law, 32 A.B.A.J. 35 (January, 1900)
- 46 The Merry Corp., A.B.C.A. No. 3145, 1908
BCA # 3058
- 47 School, District and Appellate: The School
District Board of Contract Appellate, 33 Law
& Company, Tribes, 30 (1904) 33, 44, 46, 47
- 48 General-Industrial Mechanical Society, per
Action, A.B.C.A. No. 6141, 61-1 BCA
2017 (1901)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 440

UNITED STATES, PETITIONER.

v.

UTAH CONSTRUCTION AND MINING COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings and opinions of the Atomic Energy Commission's Advisory Board on Contract Appeals (R. 78, 100, 126) and the Commission's Hearing Examiner (R. 64) are unreported. The order and memorandum of the Commissioner of the Court of Claims (R. 37) is unreported. The opinion of the Court of Claims (R. 142) is reported at 339 F. 2d 606.

JURISDICTION

The opinion and order of the Court of Claims were entered on December 11, 1964. Respondent's timely petition for reconsideration was denied on March 12, 1965. By order entered on June 10, 1965, the Chief Justice extended the time for filing a petition for a

writ of certiorari to and including August 9, 1965. The petition for a writ of certiorari was filed on August 9, 1965, and was granted on November 8, 1965 (R. 165; 382 U.S. 900). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).¹

QUESTIONS PRESENTED

1. Whether factual disputes once administratively resolved pursuant to the standard disputes clause of government contracts may be tried *de novo* by a court in a suit for breach of contract.

2. Whether factual disputes underlying claims for breach of contract are generally subject to administrative resolution under the standard disputes clause of government contracts.

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act), 41 U.S.C. 321-322, provides:

That no provision of any contract entered into by the United States, relating to the finality or

¹ Although the decision of the Court of Claims does not finally grant or deny relief, this Court has jurisdiction to review the decision under 28 U.S.C. 1255(1), which extends certiorari jurisdiction to "[c]ases in the Court of Claims." Pursuant to this provision and its predecessor, which conferred jurisdiction over "judgments and decrees of the Court of Claims," this Court has held that it would review interlocutory orders of the Court of Claims. *United States v. Caltex, Inc.*, 344 U.S. 149; *United States v. Central Eureka Mining Co.*, 357 U.S. 155; see *Marconi Wireless Co. v. United States*, 320 U.S.

1. The decision of the Court of Claims in this case finally determines the right in issue—*i.e.*, the right to have the factual matters here involved determined administratively pursuant to the disputes clause rather than judicially. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541; *Gillespie v. United States Steel Corp.*, 379 U.S. 148.

conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same as fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2. The contract (Exhibit A to the petition in the Court of Claims, R. 15) provided in pertinent part:

Article 3. *Changes.*

The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action,

may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. *Changed conditions.*

Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 9. *Delays—Damages.*

If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any

extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government make take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day or delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract

with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

Article 15. *Disputes.*

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

1. *Background.* This case arises out of a contract between the United States, acting through the Atomic

Energy Commission, and respondent Utah Construction and Mining Company, for the construction of structures at the Aircraft Nuclear Propulsion Project of the National Reactor Testing Station in Idaho. The contract was executed in March, 1953, at a price of \$4,583,028.20 (R. 119). The contract contained a standard government contracts disputes clause, providing for the resolution of "all disputes concerning questions of fact arising under this contract" by the contracting officer and, upon timely appeal from his decision, by the duly authorized representative of the A.E.C., "whose decision shall be final and conclusive upon the parties." (R. 17, *supra*, p. 6). Work on the contract was completed on January 7, 1955 (R. 142).

2. *Administrative Claims and Proceedings.* During and subsequent to the performance of the contract, various disagreements arose between respondent and the A.E.C. Pursuant to the standard disputes clause in the contract respondent submitted to the contracting officer claims for relief flowing from these disagreements. The contracting officer resolved these claims—some favorably to respondent and some adversely to it (R. 52-56, 94-98, 121-124, 138-141). Respondent thereafter took appeals to the Advisory Board of Contract Appeals, the designated representative of the A.E.C. for hearing such appeals pursuant to the disputes clause. In 1957, while these administrative appeals were pending, all but four of the claims were settled (R. 38).

The remaining four controversies before the A.E.C. Board are referred to hereafter as the "pier drilling" claim, the "concrete aggregate" claim, the "shield window" claim, and the "shield door" claim. As to three of these four claims (the pier drilling, concrete aggregate and shield window claims) respondent sought administrative relief under the "changed condition" clause of the contract (Article 4, *supra*, p. 4), and the "delays-damages" clause (Article 9, *supra*, pp. 4-6). Under the changed conditions clause, the contracting officer is obliged to reimburse the contractor, and to grant additional time, for additional costs resulting either from subsurface or latent conditions differing from those shown in the contract drawings or specifications or from unknown conditions of an unusual nature differing from those ordinarily encountered in the type of work. The delays-damages clause requires extensions, and excuses the contractor from liquidated damages, for failure to complete his work on time, where delay results from specified causes beyond the control of the contractor. Under these clauses, respondent requested compensation for increased costs, including costs incurred by reason of delays caused by the government, and extensions of time.² As to the fourth claim, the "shield door" claim (R. 47, 127, 135), respondent sought relief under the "changes" clause of the contract (Article 3,

² In the pier drilling and shield window claims respondent sought time extensions, costs for extra work, and increased costs due to delays (R. 10, 79, 120, 121). In the concrete aggregate claim respondent apparently sought only increased costs for extra work, without any request for delay damages or extensions of time (R. 52, 74).

supra, pp. 3-4) which calls for an equitable adjustment in the contract price and time limits, if changes ordered in the drawings or specifications change the cost or time of performance. Here also respondent sought reimbursement for alleged additional costs and extensions of time.

Three of the four matters (the pier drilling, shield window, and shield door claims) were heard before a panel of the Advisory Board of Contract Appeals, consisting of Dean Robert Kingsley of the School of Law of the University of Southern California, and Edmund R. Purves, a consulting architect of Washington, D.C. The Board heard each matter in a full-dress adversary proceeding, with testimony, cross-examination, exhibits, briefs and argument. Where appropriate, the Board also viewed the construction site (R. 80-81, 102-103, 129). In regard to each matter, the Board ruled that its jurisdiction was clear and it rendered decisions, with full discussion and findings (R. 80, 102, 128; 78-93, 101-120, 127-137).

With regard to the pier drilling claim the Board found that there had been a "changed condition," but that this condition had caused neither delay in respondent's completion of the contract nor extra costs to respondent (R. 84; see R. 39). Accordingly, the Board denied respondent's requests for compensation for increased work and for delay, and for extensions of time (R. 92-93). In the shield window claim the Board found that there had been no changed conditions, but that the difficulties experienced by respondent, while caused to a large extent by its lack of knowledge and experience, were, in some measure, un-

foreseeable (R. 118-120). Accordingly, it granted extensions of time, but denied respondent's requests for costs and delay damages (R. 120). In the shield door claim the Board found that, as to most of the matters, there had been no change under Article 3; as to the two changes which it found had been made, the Board found that respondent had made no claim until over a year after the change, and that the contracting officer therefore did not abuse his discretion by refusing to waive the 10-day limitation on claims imposed by Article 3 (R. 133-134). Insofar as the request was one for a time extension, however, the Board treated it as one for an extension of time under Article 9, and granted partial relief (R. 136-137).

The concrete aggregate claim was heard on appeal from the contracting officer by a hearing examiner.³ The contracting officer moved to dismiss the claim as untimely. The examiner ruled that the claim had been made three years after respondent became aware of the alleged changed condition, although the contract required that the contracting officer be notified "immediately" of such changed conditions (R. 65, 75-76). Respondent did not seek review of the hearing examiner's decision, as it could have under the Rules of Procedure in Contract Appeals.⁴

³ Under the procedure then in effect, contract appeals were heard by a hearing examiner, with discretionary review by the Commission. 24 Fed. Reg. 726. Since then, the Commission has returned to the use of a Board for hearing contract appeals. 10 C.F.R. Part 3 (1965).

⁴ Sections 3.30 and 3.31, 24 Fed. Reg. 726.

3. *Proceedings in the Court of Claims.* Respondent brought this action for damages in the Court of Claims by petition filed on January 6, 1961 (R. 1)—some 6½ years after the events in question took place.⁵ The petition alleged generally that the government's delays, misrepresentations, and failures to perform the contract had caused increased costs on respondent's part (R. 1-4). More specifically, the petition charged the government with causing increased costs in connection with five phases of the contract, four of which are the phases involved in the administrative decisions summarized above.⁶ Respondent alleged substantially the same basic facts as those underlying its administrative pier drilling, shield window, shield door and concrete aggregate claims. In regard to the pier drilling and shield window claims, respondent in addition substantially repeated the same monetary requests for relief which it had asserted administratively. In regard to the concrete aggregate and shield door claims, respondent sought increased costs due to delay which had not been asserted administratively (R. 4-11).

In the Court of Claims, respondent took the position that the controversies it was presenting to the court did not "arise under" the contract within the

⁵ The events underlying the shield window claim took place in the summer of 1954 (R. 106). The events underlying the other three claims took place in the summer, fall and winter of 1953-1954 (R. 68-70, 83-84, 131).

⁶ As to the fifth claim—the so-called "Amercoat Paint" claim—the Court of Claims decided that respondent's claim was barred by a release (R. 154-155). The correctness of that decision is not here in question.

meaning of the standard disputes clause contained in the contract (*supra*, p. 6) and hence that the facts underlying those controversies could be tried *de novo* by the court consistently with this Court's decision in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709. The government contended that the disputes did fall within the disputes clause; it also took the position that, in accordance with the *Bianchi* decision, the court should in no event conduct a trial *de novo* of relevant facts previously determined pursuant to proper administrative disputes procedures, but should, as to those facts, be confined to a review of the administrative record. The commissioner ruled that respondent was entitled to a trial *de novo* on all its claims, with the exception of one part of its pier drilling claim which did in his view fall within the disputes clause (R. 37-51).

The government sought review of the commissioner's order. The Court of Claims ruled that the language in the standard disputes clause providing an administrative remedy for "disputes concerning questions of fact arising under this contract," "means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract" (R. 145).⁷ Thus, the court held that

⁷ The court distinguished between the two kinds of claims in the following example (R. 148):

"For example: The contracting officer makes a change in the contract and the contractor asks for the increase in his cost as a result of the change and for an extension in time for the delay incident thereto. The contracting officer allows him a sum for the increase in cost and determines he has been delayed X days. The contractor thinks he has been delayed more than X days,

issues of fact underlying claims for "breach" of contract were not within the scope of the disputes clause. From this, the court thought it also followed that when facts had actually and properly been administratively resolved pursuant to the disputes clause, such administrative determinations should not be accorded finality in a suit between the parties when the same facts later became relevant in a suit for breach of contract. The court affirmed the commissioner's ruling that the pier drilling and shield window claims were primarily claims for "breach" of contract, and therefore ordered a trial *de novo* on the factual issues in these claims without regard to the administrative record and findings previously made on the relevant facts (R. 150-151, 152-153). Similarly, on the concrete aggregate claim, the court ruled that if the claim

but his only recourse is an appeal to the head of the department whose decision is final because this is a dispute arising under the contract. In the absence of action which is arbitrary, etc., this is the end of the matter, so far as increased costs and extension of time are concerned, for all findings of fact of the contracting officer and head of the department in such disputes are final and conclusive.

"But the contractor still thinks he has been delayed more than X days and he further thinks the delay was so unreasonable as to amount to a breach of contract, so he sues for damages for the breach. In such an action the findings of fact of the contracting officer are not final, because this is not a dispute 'arising under the contract.' It is only as to those disputes that the contract does make his findings final. In a suit for a breach because of an unreasonable delay, the court, in order to determine whether the delay was unreasonable and, hence, a breach of the contract, must determine the extent of the delay. In such a dispute the parties did not agree that the decisions of the contracting officer should be final and conclusive."

was one for breach of contract, rather than one "arising under" the contract, the factual issues should be resolved in a judicial trial (R. 151-152). On the other hand, it ruled that the shield door claim was one "arising under" the contract under the disputes clause and was therefore not subject to a judicial trial *de novo* (R. 153-154).

Judge Davis dissented * on the ground that the administrative determination of factual disputes, properly made under the disputes clause after full hearing, should be binding upon the parties in subsequent actions for breach of contract. Judge Davis accordingly would have ruled that the facts which were actually found administratively on the pier drilling and shield window claims should not be subject to a second evidentiary hearing. In regard to any relevant facts pertaining to "breach" of contract claims which were not actually litigated and determined administratively, however, he agreed with the court that the contractor should have a judicial trial. Accordingly, he concurred in granting a trial on any relevant facts pertaining to the shield window claim which were not covered by the Board's supportable findings, and in regard to all of the facts on the concrete aggregate claim,* if that claim were to be viewed as a "breach" rather than an "arising under" claim, a matter on which he, like the majority, declined to express any opinion (R. 161-162).

* Chief Judge Cowen separately concurred in the decision of the Court without reaching the issue on which Judge Davis dissented.

* The A.E.C. hearing examiner did not resolve the factual disputes as to this claim because of respondent's failure to present them in a timely fashion.

ARGUMENT

INTRODUCTION AND SUMMARY

The standard disputes clause of government contracts stipulates that "all disputes concerning questions of fact arising under this contract" are to be decided by the contracting officer with provision for appeal to an administrative board "whose decision shall be final and conclusive upon the parties." Such contracts also typically contain specific articles providing for administrative relief in many situations where the contractor complains, during the course of the contract, that he has been harmed either by the action of the government or by changed or unforeseen conditions affecting his performance of the work. In this case, for example, the contract contained a "changed conditions" clause (Article 4, *supra*, p. 4), requiring the contracting officer to reimburse the contractor, and to grant additional time for performance, for a broad range of unanticipated changed conditions affecting the contractor's performance. The contract also contained a "delays-damages" clause (Article 9, *supra*, pp. 4-6), requiring extensions of time for performance, and excusing the contractor from liquidated damages for delays, where delays in performance are caused by a range of specified conditions beyond the control of the contractor. Finally, the contract contained a "changes" clause (Article 3, *supra*, pp. 3-4), calling for an equitable adjustment in the contract price and in time limits set for the contractor's performance, where changes in the original contract specifications affect the contractor's costs or time of performance.

Pursuant to these contract provisions for administrative relief and the disputes clause, respondent, the contractor in this case, presented to the contracting officer and the appeal board a number of claims for reimbursement and extensions of time connected with the contract. Some of these claims were resolved in respondent's favor, others were not. In this Court, the case involves four claims arising out of separate aspects of the contract (the "pier drilling claim," the "shield window claim," and the "shield door claim" and the "concrete aggregate claim") which were not settled administratively in a way deemed satisfactory by respondent. Two of the claims (the pier drilling claim and the shield window claim) were rejected because the essential facts on which respondent premised his claims for relief were found against respondent's contentions. One claim (the shield door claim) was rejected both because most of the facts were not found in respondent's favor and because, as to those facts which were found to give rise to a claim for relief, respondent was found not to have made his claim in timely fashion. The fourth claim (the concrete aggregate claim) was rejected as wholly untimely without any findings as to the relevant facts.

Respondent thereafter brought the present suit for breach of contract in the Court of Claims based upon the same four aspects of the contract. As to the three claims where the contracting officer and the administrative appeal board had already made findings of fact pursuant to the disputes clause and respondent's administrative claims, respondent's claims were largely based upon facts already administratively

determined contrary to his allegations. As to these claims, the administrative findings of fact, if treated as final in the present suit, would generally require rejection of the judicial claims. Respondent also, in some instances, asserted in the Court of Claims facts as to damages caused by alleged delays which had not been determined administratively and which might become relevant if the facts already found were to be redetermined in respondent's favor. Finally, with respect to the "concrete aggregate claim," none of the relevant facts had been determined because that claim had been administratively dismissed as untimely.

The issues before this Court are essentially simple ones relating to the role of the Court of Claims in the determination of the facts underlying respondent's present claims. They are as follows: (1) where the relevant facts underlying respondent's claims in the Court of Claims have been previously determined administratively, whether they should be re-tried *de novo* by the court; (2) where facts may become relevant which have not been previously determined administratively, whether they should be determined in the first instance by the court or by administrative proceedings pursuant to the disputes clause. As to these issues the Court of Claims has held that all facts relating to claims for "breach of contract," i.e., claims not directly invoking specific language in the three contract provisions for administrative relief described above, should be determined *de novo* by the court whether or not the identical facts have previously been, or could have been, determined administratively. In our view this was error for two basic reasons.

In the first place we believe that principles of finality, as applied to administrative determinations of fact relating to government contracts by this Court's decision in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, require that facts once properly administratively determined pursuant to claims for administrative relief not be re-examined *de novo*.

Secondly, we believe that the underlying premise of the Court of Claims' decision is erroneous. The court has refused to accord finality to administrative determinations of fact, and has asserted the right to make new determinations of fact, because of its view that the administrative fact-finding function under the disputes clause is a narrow one, limited to facts as they apply to claims for administrative relief bottomed upon specific clauses of the contract such as the "changed conditions," "changes" and "delays-damages" clause. In fact, however, the administrative fact-finding function under the disputes clause broadly applies to all facts of the kind committed to administrative determination by those clauses, whether or not they relate directly to claims under an express contractual clause. All of the facts in this case are of this kind. Thus, not only did the Court of Claims erroneously order a trial *de novo* upon facts previously administratively determined; it was also in error in suggesting that the administrative fact-finding process did not apply to facts, should they become relevant, which have not yet been determined in this case.

I

FACTUAL ISSUES ONCE ADMINISTRATIVELY RESOLVED PURSUANT TO THE STANDARD DISPUTES CLAUSE OF GOVERNMENT CONTRACTS MAY NOT BE TRIED *DE NOVO* BY THE COURT

The principal class of factual issues in this case upon which the Court of Claims has ordered its commissioner to conduct a trial *de novo* are issues which have been previously resolved administratively. As to these issues, the claims now presented in the Court of Claims for breach of contract depend upon facts already litigated administratively pursuant to claims for relief under Articles 3, 4, or 9 of the contract.

The facts underlying the pier drilling claim are illustrative of this class of factual issues.¹⁰ Before the contracting officer and the Board, respondent claimed that the existence of loose or "float rock" not disclosed in the contract documents had hampered drilling and excavation for "piers" (foundations). This "float rock" was urged to constitute a "changed condition" under Article 4 of the contract, and compensation for increased drilling costs and increased costs of building construction due to delays, as well as a time extension, were sought under Articles 4 and 9. (R. 15-16, 77-98.) The Board found, after a full-scale adversary hearing, that respondent had in fact encountered subsurface float rock constituting a changed condition within the meaning of Article 4. This changed condition was found to have resulted

¹⁰ Facts previously administratively resolved under similar circumstances are also involved in the shield window and the shield door claims.

in some increases in the costs of drilling and in some delay. The Board ruled, however, that the increased drilling costs had been incurred by a subcontractor—not by respondent; that respondent had not shown any liability over to the subcontractor for these costs; and that any delays caused by the float rock did not result in construction delays causing increased construction costs to respondent (R. 38-39). Accordingly, the Board denied respondent's claims for an extension of time and for increased compensation.

In the Court of Claims respondent made claims for "breach of contract" based upon the same delays and increased costs allegedly resulting from the existence of the "float rock." In its opinion, the Court of Claims described these claims as follows (R. 150):

Plaintiff claims that in drilling and excavation for "piers," or foundation shafts for certain buildings, it encountered subsurface conditions differing materially from those indicated in the contract documents. First, it claimed additional compensation for the extra cost of drilling the "float rock" which it had encountered and which it claimed was not shown on the contract documents. * * *

Plaintiff also claims damages for delay by reason of the refusal of the contracting officer to modify the contract on account of the changed conditions encountered. * * *

It is evident that the factual basis of the pier drilling claims thus presented to the Court of Claims was identical with facts previously determined by the Board in claims presented to it under Articles 4 and

9 of the contract. As to these facts, the Board determined that respondent had not itself suffered any increased drilling costs or construction delays by reason of the unexpected "float rock." Nevertheless, the Court of Claims has held, as to that part of respondent's claim which was for damages due to delay, that "[s]ince this is an action for breach of contract [rather than a dispute "arising under the contract"], the parties are not bound by the decision of the board and may introduce evidence *de novo* concerning any unreasonable delay" (R. 150). We submit that this decision, subjecting to trial *de novo* facts previously determined administratively in claims presented pursuant to the contract, was erroneous.

Trial *de novo* of factual issues previously determined between a contractor and the government is, in our view, precluded by both the disputes clause of the contract and the Wunderlich Act (41 U.S.C. 321) as those provisions were applied in this Court's decision in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, as well as by policies favoring finality and the orderly administration of disputes under government contracts.

1. The standard disputes clause, contained in the contract in this case, provides that "all disputes concerning questions of fact arising under this contract" shall be administratively determined by the contracting officer and Board, which administrative determination "shall be final and conclusive upon the parties * * *." The Wunderlich Act reiterates that such an administrative decision is to be "final and conclusive" unless it is "fraudulent [*sic*] or capricious

or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (41 U.S.C. 321).

In *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, the Court considered the effect of these finality provisions upon the contention that a court, in a suit for breach of a government contract, may try *de novo* factual issues previously administratively determined pursuant to the standard disputes clause of that contract. As stated by the Court, the issue before it was whether, in a judicial suit on the contract "the court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues" (373 U.S. at 710). After a review of the language, history and purposes of the Wunderlich Act, the Court held that "apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department" (*id.* at 714). The Court relied significantly upon the purpose of the Wunderlich Act to "require each party to present openly its side of the controversy and afford an opportunity of rebuttal" in the administrative proceedings (H. Rep. No. 1380, 83rd Cong., 2d Sess., p. 5). In the Court's view, "[t]his sound and clearly expressed purpose would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding. Moreover, the consequence of such a procedure would in many instances be a needless duplication of eviden-

tiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end" (373 U.S. at 717).

These principles are fully dispositive of the right of respondent to a trial *de novo* on the factual issues in this case which have previously been administratively resolved under the disputes clause pursuant to respondent's claims under Articles 3, 4 and 9 of the contract. Here the Board, after a full hearing, decided facts upon which respondent's subsequent judicial claims were based. For example, as to the "pier drilling claim," used as an illustration above, the Board decided that the drilling delays occasioned by the changed conditions had not caused respondent to incur construction delays in completing the contract. When respondent later asserted a claim for breach of contract in the Court of Claims based upon damages allegedly caused by construction delays resulting from the same changed conditions, respondent was not entitled to a second evidentiary hearing relating to the issue of whether construction delays had occurred. Under the disputes clause and the Wunderlich Act, this issue had been finally decided administratively subject only to judicial review for fraud or arbitrariness or for lack of substantial evidentiary support. Such limited review, under the *Bianchi* decision, "must rest solely on consideration of the record before the department" (373 U.S. at 714). The Court of Claims decision ordering a judicial trial *de novo* on this class of issues was therefore error.

2. The Court of Claims sought to avoid this result by holding that factual issues relating to a certain class of judicial claims for relief, namely, those for "breach of contract," must in all events be determined by a judicial trial *de novo* regardless of prior administrative proceedings resolving the same facts. It found such judicial claims to be present in this case. In the view of the Court of Claims, the facts underlying these claims for relief were subject to a judicial trial *de novo* because the claims were believed not to be amenable to resolution under the standard disputes clause. Since the court believed that these *claims* could not be administratively resolved, it held that the *facts* underlying the claims could also not be finally administratively resolved for purposes of the judicial suit. Thus, even though the facts upon which a claim was based had been previously litigated administratively pursuant to a claim—such as one for compensation or for extensions of time for "changed conditions"—over which there was clear administrative jurisdiction, the Court of Claims held that the same facts must be relitigated and redetermined *de novo* when they became relevant to a judicial breach of contract claim arising from the same changed conditions.

There are two reasons why this distinction is untenable. In the first place, even if the assumption were correct that the standard disputes clause does not generally confer administrative jurisdiction to resolve the facts underlying claims for breach of contract—an assumption which we dispute—that would provide no basis for the decision in this case. Regardless of the conceptual labels attached to successive

claims relating to the contract, all of the reasons given in this Court's *Bianchi* decision for according finality to administrative decisions of fact apply where facts are once litigated administratively pursuant to a proper administrative claim and a judicial claim later depends upon the same facts.

As the illustrative pier drilling claim shows, the same alleged facts (for example, alleged delays caused by unanticipated "float rock") may give rise either to a claim which can be framed as one for compensation and extensions of time under Articles 4 and 9 of the contract or to a claim which can be framed as one for "breach of contract" due to the failure of the contracting officer to modify the contract to account for the "changed conditions." Once the facts underlying either of these legal verbalizations of the claim have properly been determined administratively there is no reason whatever to undertake *de novo* litigation of those facts merely because the contractor arrives at a different legal formulation of a claim based on the same facts. As Judge Davis pointed out in dissenting on this issue below, the terms of the disputes clause and the Wunderlich Act, as well as the principle underlying the *Bianchi* decision and the general policy of collateral estoppel, mean that once an issue of fact is properly decided administratively, that decision, if supported, is to be "final and conclusive on the parties—not simply final and conclusive for a special purpose, but final and conclusive without qualification and without limitation. * * *

The Supreme Court made it plain [in *Bianchi*] that

Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In light of *Bianchi's* evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies" (R. 159-160; emphasis in original).

That the *Bianchi* rule of finality thus does not depend upon the conceptual legal context in which facts are presented is, moreover, shown by the circumstances of the *Bianchi* case itself. In that case, a claim was first made for compensation under the "changed conditions" clause and rejected by the contracting officer and the Board. The contractor then brought an action for damages of "breach of contract" (373 U.S. at 711) in the Court of Claims, based upon the contracting officer's rejection of the changed conditions claim (just as in the pier drilling claim in this case illustrated above). Despite the change of legal theory involved—the same change involved in this case—the Court held that there was to be no trial *de novo* of facts previously properly decided administratively. In addition, courts of appeals have also uniformly given administrative findings of fact properly rendered pursuant to the disputes clause the finality accorded by that

clause and the Wunderlich Act, regardless of the conceptual nature of the judicial claim involved. See e.g., *United States v. Peter Kiewit Sons' Co.*, 345 F. 2d 879, 885-886 (C.A. 8); *Allied Paint & Color Works v. United States*, 309 F. 2d 133, 138 (C.A. 2), certiorari denied, 375 U.S. 813; *United States v. Hamden Co-operative Creamery Co.*, 297 F. 2d 130, 133-135 (C.A. 2); *Silverman Bros. v. United States*, 324 F. 2d 287, 289-290 (C.A. 1).

In addition, as a second reason for rejecting the Court of Claims distinction in this case, we believe that the court has erroneously construed the standard disputes clause as not generally applying to the resolution of facts underlying "breach of contract" claims. In our view, the disputes clause does generally apply to the resolution of such facts. We treat this second reason for reversing the Court of Claims' decision in the next section of this brief.

II

FACTUAL ISSUES UNDERLYING CLAIMS FOR BREACH OF CONTRACT ARE DISPUTES ARISING UNDER THE CONTRACT WITHIN THE STANDARD DISPUTES CLAUSE OF GOVERNMENT CONTRACTS, AT LEAST INsofar AS THE FACTUAL ISSUES ARE OF THE KIND CLEARLY COMMITTED TO ADMINISTRATIVE DETERMINATION BY THE CONTRACT

In the preceding section of this brief, we showed that policies of finality dictate that factual issues once properly resolved administratively should not be tried *de novo* in subsequent suits for breach of contract whether or not the standard disputes clause is construed to extend generally to the resolution of facts underlying claims for breach of contract. There is an additional reason for rejecting a judicial trial *de novo*

of the factual issues in this case. The Court of Claims' decision refusing to accord finality to the administrative determinations here proceeds on the premise that there is in fact no administrative jurisdiction generally to resolve factual issues underlying claims for "breach of contract." In the court's view, administrative jurisdiction extends only to the resolution of facts pursuant to claims under contract clauses such as those for "changed conditions," "changes" and "delays-damages" (Articles 3, 4 and 9 in this case) where the right to administrative relief is clearly specified. No such clause specifies a right to obtain administrative relief for "breach of contract." Since the Court of Claims believed that the administrative process therefore could not directly resolve factual disputes underlying breach of contract claims, it believed that administrative findings of fact pursuant to administrative claims should not be permitted indirectly to resolve such breach of contract disputes.

The Court of Claims' premise is, we submit, erroneous. In our view, questions of fact underlying claims for breach of contract can be resolved under the standard disputes clause, at least where those facts (as they are in this case) are of the kind similar to those committed to administrative determination by contract clauses such as those according administrative relief for "changed conditions," "changes" and "delays-damages." We ask the Court to resolve this issue here, not only because it provides the premise for the erroneous refusal of the Court of Claims to accord finality to administrative determinations in this case, but also because the scope of the disputes clause

is a recurring issue of substantial importance. In addition, we note that two of the claims in this case—the concrete aggregate claim and the shield window claim—potentially involve undecided factual issues as to which the right to judicial trial may ultimately depend upon the scope of the disputes clause. In the concrete aggregate claim, none of the facts underlying the judicial claim for breach of contract have been decided, because the administrator has held the claim to be time barred (R. 64-76). If the claim is ultimately held not to be time barred, and if the claim is deemed by the Court of Claims to be one for “breach of contract,” rather than under one of the specific contract clauses, the Court of Claims will accord a judicial trial on the relevant facts unless this Court holds that the disputes clause is applicable to resolve these facts. In the shield window claim, which the Court of Claims has already held to be one for breach of contract (R. 152-153), the court has held that there must be a judicial trial on any relevant facts which have not yet been developed administratively (*ibid*). This decision is also erroneous if, as we contend, the disputes clause is the vehicle for the resolution of such factual issues.

1. A claim for “breach of contract” involves an assertion of rights and duties created and defined by the contract. In this case, for example, respondent asserts that the government failed to fulfill duties imposed upon it by the contract. Since the rights and duties which govern the claim are created and defined by the contract, we believe that the factual disputes pertaining to the claim are disputes “arising under”

the contract amenable to resolution under the standard disputes clause of the contract.

The phrase "arising under" in the disputes clause is a phrase commonly used to define jurisdiction. The "federal question" jurisdiction of the district courts, for example, turns upon whether "the matter in controversy * * * arises under the Constitution, laws, or treaties of the United States" (28 U.S.C. 1331).¹¹ It is settled that a matter in controversy thus "arises under" federal law if a right created or controlled by federal law is an essential element in the cause of action. *Peyton v. Railway Express Agency*, 316 U.S. 350, 352-353; *Gully v. First National Bank*, 229 U.S. 109, 112-113; *American Well Works v. Lane & Bowler Co.*, 241 U.S. 257, 260. Similarly, we believe that the language "all disputes concerning questions of fact arising under this contract" can be applied to facts underlying all asserted rights and duties created by the contract—including the assertion of remedies for "breach of contract."

The majority opinion of the Court of Claims, however, distinguishes between factual disputes concerning "the rights of the parties given by the contract"—which it regards as the only disputes "arising under" the contract—and disputes "over a violation of the contract"—which it considers to be "breach of contract" disputes outside the coverage of that clause (R. 145). It is not clear exactly where the Court of

¹¹ See also, 28 U.S.C. 1338 (civil action "arising under" patent, copyright or trademark statutes); 28 U.S.C. 1339 (civil action "arising under" postal statutes); 28 U.S.C. 1340 (civil action "arising under" revenue statutes).

Claims would draw the line between the two types of disputes. In some opinions the Court of Claims takes the position that the disputes clause is confined to disputes relating to other clauses in the contract which authorize the contracting officer to give the contractor specific relief in defined circumstances—as, for example, Article 3, which requires the contracting officer to adjust the terms of the contract to meet changes in the drawings or specifications; Article 4, which requires him to modify the contract for “changed conditions”, or Article 9, which requires him to extend the time for performance if the contractor is delayed through no fault of his own (R. 15-17). The argument is that the disputes clause merely provides an appeals procedure to be followed after the contracting officer has made a decision under such a clause of the contract. Thus a dispute would “arise under” the contract if the contract (apart from the disputes clause) specifically authorizes the contracting officer to accord relief; otherwise, the dispute concerns a “breach of contract.” See, *e.g.*, Judge Davis’ dissenting opinion below (R. 156); *Morrison-Knudsen Co. v. United States*, 345 F. 2d 833, 837 (Ct. Cl.).¹² Under this narrow definition of the scope

¹² We note that the foregoing explanation of the “breach claim” “contract claim” distinction is not sufficient to explain all that court’s decisions. For there are several situations where the relief given by the Court of Claims under a “breach of contract” theory duplicates the relief available to the contractor under various standard contract clauses. For example, the Court of Claims holds that the contractor’s claim for expenses caused by inaccuracies in the contract documents drafted by the government is a “breach” claim. *Potashnick v. United States*, 123 Ct. Cl. 197, 218-20; 105 F. Supp. 837,

of the disputes clause, as applied by the Court of Claims in this case, a party denied administrative relief under a specific clause need only assert that the government's conduct underlying his request for relief was unreasonable in order to transmute a claim "arising under" the contract into one for "breach." For, in the Court of Claims' view, a claim that conduct entitling the contractor to relief under a particular clause was unreasonable, is not a claim for relief under that clause (see R. 148).¹³

The Court of Claims has also defined "breach" claims, as distinguished from those "arising under" the contract, as claims for unliquidated damages. *Continental Illinois Nat. Bank & Trust Co. v. United States*, 121 Ct. Cl. 203, 246, 101 F. Supp. 755, 759,

839 (1952). Yet identical relief is available to the contractor under the standard "changed conditions" clause, which requires the contracting officer to modify the contract to reflect cost changes resulting from sub-surface or latent conditions differing materially from those shown on the drawings or specifications (R. 15-16). For other examples of "breach of contract" relief duplicating relief which the contracting officer is specifically authorized to give by the contract, see n. 18, *infra*, p. 37.

¹³ The Court of Claims' interpretation, in addition, requires that the words "arising under" be read to refer to "disputes" rather than to "questions of fact." This reading runs counter to the Wunderlich Act (41 U.S.C. 321) which refers to contracts requiring administrative decision of "a dispute involving a question arising under such contract." The pre-Wunderlich "all disputes" clause similarly covered "all disputes concerning questions arising under this contract." *United States v. Holpuch*, 328 U.S. 234. The present express limitation of the clause to "questions of fact" was intended only to preclude any finality to administrative determinations of questions of law, in accordance with the Wunderlich Act.

certiorari denied, 343 U.S. 963. But surely the question of whether a factual dispute is one within the disputes clause should not turn on the kind of damages which a claim seeks. Again, this would give the party asserting the claim the choice of proceeding administratively or judicially according to the way in which he formulates his claim.

2. These distinctions drawn by the Court of Claims between "breach" claims and "contract" claims frustrate the purpose of the disputes clause, by giving it an arbitrarily narrow application. This clause, drafted in substantially its present form in 1926, was designed to provide an expeditious means of settling disputes arising between contractors and the government. The clause "creates a mechanism whereby adjustments can be made and errors corrected on an administrative level, thereby permitting the Government to mitigate or avoid large damage claims that might otherwise be created." *United States v. Holpuch Co.*, 328 U.S. 234, 239. See, generally, Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemp. Probs. 39, 42-57 (1964).

One of the purposes of the disputes clause is to make sure that the contractor continues to perform the work of the contract, which in many instances is important to defense or other essential governmental purposes, while the dispute is being resolved. The disputes clause expressly provides that "[i]n the meantime the contractor shall diligently proceed with the work as directed." Yet if the Court of Claims is correct in believing that all claims for "breach" are outside the coverage of the clause, the contractor

would be free to stop work and bring suit for "breach" on claims which do not conceivably justify a work stoppage—for example, a claim that the contracting officer has unreasonably refused an extension of time. Government procurement officers would be astonished and dismayed by this result, as would most contractors. Yet it follows logically from the position adopted by the Court of Claims in this case.

From the standpoint of providing an expeditious administrative process for settling factual disputes, we submit that it makes no difference whether a dispute is a "breach" claim or an "arising under" claim, within the meaning of the Court of Claims' distinction. In either situation, the questions of fact are likely to involve complex technical details; in either case, a judicial trial of the factual questions involved is as likely to be expensive, time-consuming, and disruptive of the continuing relationship of the parties; in either case, it is in both parties' interest to provide for expeditious settlement. For example, the classic kind of "breach" claim under the dichotomy drawn by the Court of Claims is a claim for damages due to delays to the contractor unreasonably caused by the government.¹⁴ In such a claim, the critical factual dispute is usually whether the delay was the responsibility of the contractor, or was the fault of unreasonable conduct on the part of government officials.

¹⁴ See the example given by the majority in this case (R. 148). See also, e.g., *Langevin v. United States*, 100 Ct. Cl. 15, 29-31; *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212; *Continental Illinois Nat. Bank & Trust Co. v. United States*, 126 Ct. Cl. 631, 115 F. Supp. 892.

On the other hand, the Court of Claims would hold that a claim for an extension of time, or for relief from liquidated damages under the standard "delays—damages" clause (Article 9, R. 16-17 in this case), involves factual questions "arising under" the contract, within the disputes clause.¹⁵ The critical factual issue in such claims is also whether the delay was caused by matters within the control or responsibility of the contractor, or by "acts of the Government" or other factors not subject to his control. Similarly, another classic "breach of contract" claim, under the dichotomy drawn by the Court of Claims, is a claim for misrepresentation, based upon the assertion that the specifications and drawings for the contract did not accurately reflect latent conditions, or the work to be done.¹⁶ Yet factual disputes about the accuracy and adequacy of the specifications are also the heart of controversies underlying claims for equitable adjustments under the standard "changes" and "changed condition" clauses (here Articles 3 and 4, pp. 3-4, *supra*), claims which this Court has ruled,¹⁷ and which the Court of Claims recognizes, arise under the contract.

The particular facts of this case provide further examples of identity or similarity of factual issues underlaying "breach" and "arising under" claims. For example, in the shield window claim, the Board

¹⁵ *Palumbo v. United States*, 125 Ct. Cl. 678, 113 F. Supp. 450; *Union Paving Co. v. United States*, 126 Ct. Cl. 478.

¹⁶ *Potashnick v. United States*, 123 Ct. Cl. 197, 218-220, 105 F. Supp. 837, 839.

¹⁷ *United States v. Callahan Walker Construction Co.*, 317 U.S. 56.

had to decide whether the difficulties which respondent encountered in assembling and installing the shield windows were a result of its own incompetence or were the result of faulty design attributable to the government's specifications (R. 101-120). This decision was relevant to the contractor's contention that its difficulties were the result of "changed conditions," entitling it to an adjustment of the contract price, and to extensions of time relieving it of responsibility for liquidated damages under the "delays—damages" clause (R. 101-102, 108). However, if the Court of Claims passes *de novo* on respondent's allegations regarding the shield windows—as it proposes to do (R. 152-153)—it will have to decide the same or closely similar issues, *i.e.*, whether the delays which respondent encountered in assembling and installing the windows were caused by unreasonable delays on the government's part in approving shop drawings, by unreasonable rejection of windows that should not have been rejected, or by excessive and unreasonable inspection. Both the "breach" claim which the Court of Claims proposes to decide *de novo*, and the "contract" claim which the Board decided, involve detailed inquiry into the technical problems of shield windows and the adequacy of the various shop drawings and specifications for shield windows which were drawn up under the contract. This sort of inquiry is precisely the kind which the disputes clause was designed to cover.

3. The holding of the Court of Claims violates the purpose of the disputes clause in another way. In any case where the contractor can frame his claim in

terms of "breach" of contract under the court's rule, he has the opportunity of relitigating factual disputes that have already been decided administratively, pursuant to the disputes clause. The result is a "duplication of evidentiary hearings" which imposes "a heavy additional burden in the time and expense required to bring litigation to an end." See *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 717. The administrative hearing, intended by the parties to provide an expeditious means of resolving disputes, becomes instead merely an added step on the way to court—a step which prolongs and makes more expensive the ultimate resolution of the controversy.

The present case is not merely an isolated example of the waste and duplication which has resulted from the distinction drawn by the Court of Claims between "breach" claims and "contract" claims. Contractors' counsel have exercised considerable ingenuity in framing complaints which state as "breach" claims disputes which they have previously litigated under the disputes clause, and the Court of Claims has been generally inclined to support these efforts and to allow retrials of cases which have been decided administratively under the disputes clause.¹⁸

¹⁸ For example, in *Saddler v. United States*, 152 Ct. Cl. 557, 287 F. 2d 411, the contracting officer issued a change order doubling the size of the levee which plaintiff had contracted to build. Under the standard "changes" clause, providing for a contract price adjustment where the contracting officer makes changes within the general scope of the contract, the contractor obtained a price adjustment to reimburse it for additional expense caused by the change. Dissatisfied with the size of the adjustment, the contractor then sued in the Court of Claims, alleging that the change order was not within the general

It is true that some of the waste and duplication involved in the Court of Claims' distinction would be avoided if the position urged in the first part of this brief were adopted, i.e., that well-supported administrative findings as to issues actually litigated under the disputes clause are binding on the parties in the litigation of "breach" claims in the Court of Claims. However, a decision limited to this correct principle might potentially frustrate important purposes of the disputes clause and the governing statute, for a party losing before the administrative board would be permitted to obtain a second evidentiary hearing as to facts concerning its "breach" claim which were not actually litigated and decided administratively. Such a position invites a contractor to split his claims and theories under different headings, reserving some (by way of insurance) for a second round. Yet one of the basic purposes of the Wunderlich Act in providing for finality of factual

scope of the contract and was therefore a breach of contract. The Court of Claims agreed and, disregarding the administrative settlement, awarded substantial damages to provide the contractor with additional reimbursement for expenses caused by the change order.

A similar case is *Valentine and Littleton v. United States*, 144 Ct. Cl. 723. Plaintiff, who had contracted to clear a reservoir site above a dam in construction, complained that the government's closing of the dam before his work was done caused him added work and expense. The contracting officer issued a change order and adjusted the contract price to reimburse plaintiff for this additional expense. The Court of Claims decided that the allowance given by the contracting officer was too small and awarded a substantial additional sum as damages for breach of contract, on the theory that by closing the dam the government had breached an implied contractual obligation not to make the contractor's work more difficult.

findings under the disputes clause was "to require each party to present openly its side of the controversy and afford an opportunity of rebuttal" at the administrative hearings. H. Rep. No. 1380, 83d Cong., 2d Sess., p. 5. As this Court has recognized, the Congressional purpose "would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 717.

Moreover, if the distinction between "breach" and "arising under" claims is accepted, even with the modification that facts once litigated are not to be re-examined *de novo*, the contractor might have the option of short-circuiting the administrative process entirely by suing immediately on a breach theory, thereby avoiding the administrative determination contemplated by the disputes clause. In fact, the Court of Claims has recently sanctioned this procedure in *Universal Eesco Corp. v. United States*, 345 F. 2d 586, despite this Court's rulings that the disputes clause is not "a dead letter to be revived only at the convenience or discretion of the contractor," but the exclusive method of resolving disputes arising under the contract. *United States v. Holpuch*, 328 U.S. 234, 239-240; *United States v. Blair*, 321 U.S. 730, 735. Accord: *United States v. Callahan Walker Construction Co.*, 317 U.S. 56.

4. For the foregoing affirmative reasons we believe, contrary to the assumption of the Court of Claims (R. 144-145), that the standard disputes clause should be read to permit factual issues underlying claims

against the government for breach of contract to be settled by presenting the breach claim administratively, at least so long as the facts are of the kind generally similar to those committed to primary administrative resolution by contract clauses such as those providing administrative relief for "changed conditions," "changes" and "delays." The Court of Claims' assumption to the contrary was apparently based primarily upon its belief that it has become well-established, both in judicial and administrative decisions, ~~but~~ that there is no administrative jurisdiction in such circumstances. We now examine the reasons why we believe that these administrative and judicial decisions do not foreclose this issue in favor of the court's narrow view of the disputes clause.

a. Court of Claims Cases

Prior to the decision of this Court in *United States v. Carlo Bianchi & Co.*, the Court of Claims permitted the taking of *de novo* evidence on questions of fact regardless of whether the claim to which those questions pertained had been decided pursuant to the disputes clause. *Carlo Bianchi & Co. v. United States*, 144 Ct. Cl. 500, 169 F. Supp. 514; *Volentine and Littleton v. United States*, 136 Ct. Cl. 638, 145 F. Supp. 952. Thus the principal importance of the question whether a claim was amenable to administrative resolution lay in determining whether a contractor who had failed to submit his claim for decision under the disputes clause was barred from suit because of failure to exhaust administrative remedies. *E.g., United States v. Callahan Walker Construction*

Co., 317 U.S. 56, reversing 95 Ct. Cl. 314; *United States v. Blair*, 321 U.S. 730, reversing 99 Ct. Cl. 71. In the typical case, moreover, it was to the contractor's advantage first to submit his claim to the contracting officer and the administrative review board. For this would give the contractor two bites: a decision favorable to the contractor would usually be accepted by the government (indeed, the government, unlike the contractor, may not take an administrative appeal from the contracting officer's decision), while an unfavorable decision could, to a large extent, be disregarded in a subsequent suit in the Court of Claims.

It is true that, prior to the *Bianchi* decision, the Court of Claims held that the conclusiveness of prior administrative findings hinged on whether or not the claim was a claim for breach of contract; in claims for breach of contract it refused to accord finality to the administrative decision because it held such claims not to fall within the disputes clause. *E.g.*, *Langevin v. United States*, 100 Ct. Cl. 15, 29-31. As we have said, however, this distinction was of small practical significance, for administrative findings under the disputes clause, although theoretically final, had little conclusive effect in practice, as they were subject to review on the basis of a *de novo* record.

The *Bianchi* decision changed this. Under *Bianchi*, the Court of Claims was, for the first time, precluded from taking *de novo* evidence in cases covered by the disputes clause. Thus, for the first time, the scope of the disputes clause potentially determined whether evidence could be taken judicially. *Bianchi* therefore

rendered appropriate a reconsideration of past decisions regarding the scope of that clause in light of the holding of *Bianchi* that uniformity in findings of fact in cases arising under the Wunderlich Act had been part of the legislative purpose underlying that Act.

Secondly, we note that, while the Court of Claims decisions holding breach of contract claims not to be within the disputes clause go back to 1937 (*Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629-30), many of these decisions—especially those decided before 1948—were based on reasoning subsequently rejected by this Court. Prior to 1948, the leading cases were *Phoenix Bridge Company v. United States*, 85 Ct. Cl. 603, 629-30, and *Langevin v. United States*, 100 Ct. Cl. 15, 29-31. In these cases, the Court of Claims argued that power in the contracting officer finally to decide questions of fact in connection with claims for breach of contract would not be presumed, because it might be inconsistent with the court's exclusive statutory jurisdiction over these matters. And in another leading case, *B-W Construction Co. v. United States*, 101 Ct. Cl. 748, 60 F. Supp. 771, reversed on other grounds *sub nom. United States v. Beuttas, et al.*, 324 U.S. 768, the Court of Claims held that an administrative decision under the disputes clause denying a claim for breach of contract was not binding because "any agreement made in advance of the controversy which deprives a party of recourse to the courts [for breaches of contract] is contrary to public policy and, therefore, void." 101 Ct. Cl. at 767, 60 F. Supp. at 780. The reasoning of these cases was re-

jected in *United States v. Moorman*, 338 U.S. 457, where this Court, in holding the contracting officer's decision final, rejected the argument that the parties lack power to contract for the final decision by the contracting officer of questions that would otherwise be decided by the courts.¹⁹

Similarly, the belief that it would be unfair to require a contractor to have factual disputes underlying breach of contract claims decided pursuant to the disputes clause because of the asserted lack of authority of the executive agencies to settle such claims has, to a large degree, been dispelled by the subsequent decision of the Court of Claims in *Cannon Construction Company v. United States*, 319 F. 2d 173, that agencies do have such authority. (See *infra*, p. 52). Lastly, the theory which underlies some Court of Claims cases,²⁰ that claims for unliquidated damages for breach of contract concern questions of law, so that factual disputes underlying them are not subject to the disputes clause, has been rejected by a later Court of Claims decision which holds, quite properly, that factual disputes are subject to the disputes clause procedure even when they are directly related to an issue of law. *Morrison-Knudsen Co. v. United States*, 345 F. 2d 833, 836-837.

¹⁹ *Langevin* and *B-W Construction Co.* are among the cases relied on below by the Court of Claims (R. 144-145).

²⁰ *E.g.*, *B-W Construction Co. v. United States*, 101 Ct. Cl. 748, 771, 60 F. Supp. 771, 782 (concurring opinion).

b. *Administrative Practice*²¹

In most cases involving controversies growing out of a contract, as we have indicated above, the factual disputes underlying claims clearly amenable to administrative resolution are the same or substantially the same as those underlying claims formulated judicially as claims for breach of contract. In cases where administrative jurisdiction was clear, of course, the boards have resolved the factual disputes relating to the administrative claims, as the Board did in the case at bar, thus resolving factual disputes also relating to "breach" of contract claims.

In the comparatively rare cases where contractors have asserted before the boards claims for breach of contract, without at the same time asserting "arising under" claims involving the same or similar facts, the practice of the boards has not been consistent. A distinguished observer has recently commended "the blend of ingenuity and search for substantial justice" which has led the contract boards to evolve

²¹ Our discussion of administrative practice is addressed primarily to the practice of the Armed Services Board of Contract Appeals (ASBCA) and its predecessors. The ASBCA is the oldest of the administrative contract review boards, with the largest caseload, and the boards of the other procuring agencies are largely modeled after it. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 *Law and Contemporary Problems* 39, 41, 100 (1964). For a survey of the various administrative contract boards and references to the pertinent regulations, see Ablard, *A Survey of the Boards of Contract Appeal in the Federal Government and Their Authority to Decide Contract Disputes*, 30 *D.C. Bar Ass'n Journal* 64 (1963). The regulations presently governing the Atomic Energy Commission Board of Contract Appeals are set forth at 10 C.F.R. Part 3 (1965).

doctrines affording the contractor relief for virtually all government conduct which can be considered to be a breach of contract.²² Nevertheless, as Judge Davis notes in his opinion in this case (R. 157, n. 2), the boards have frequently, and perhaps usually, refused to grant relief on "pure" claims for breach of contract, which are typically claims for unliquidated damages for delay caused by the government.

The reasons for this practice may be classified under three headings. In the first place, this Court has repeatedly held that the United States is not liable under standard government contractual provisions for its delays.²³ To a large extent, therefore, the refusal of the boards to grant such relief was merely a reflection of this Court's holdings that the contractor was not on the merits entitled to such relief.²⁴ Secondly,

²² Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A.J. 35, 40 (January, 1966):

"* * * it is appropriate at least to commend the blend of ingenuity and search for substantial justice that has led the board to evolve such doctrines as the constructive or non-formal change order, and the rulings that a contractor has received a constructive and compensable acceleration through government insistence on contract time schedules in the face of excusable delays. These are a current administrative development of justice not dissimilar from the historic advances of the courts of equity."

²³ *Crook v. United States*, 270 U.S. 4; *United States v. Rice*, 317 U.S. 61; *United States v. Blair*, 321 U.S. 720, 734-735; *United States v. Foley*, 329 U.S. 64. Accord: *United States v. Croft-Mullins*, 333 F. 2d 772 (C.A. 5) (where there was an express provision precluding liability for damages caused by the Government's delay).

²⁴ The Court of Claims has distinguished the decisions of this Court on the ground that they did not involve cases in which the government's delay was "unreasonable" or "negligent."

the boards' refusal to consider "pure" breach of contract claims stems from an attempt to comply with the decisions of the Court of Claims thought to preclude such relief. The administrative boards have sometimes been reluctant to subject the parties to the expense of evidentiary hearings in cases where the Court of Claims will disregard the administrative proceedings on the ground that the board lacked jurisdiction and try the issues *de novo*. This practice on the part of the boards therefore adds little support to the decisions of the Court of Claims discussed above. Thirdly, the boards have consistently refused to grant relief on claims for unliquidated damages for breach of contract, in deference to the view that they lack the authority to pay such claims, should they decide them. However, as noted *infra*, pp. 52-54, lack of authority in the administrative boards to grant money relief is not equivalent to lack of authority to make findings of fact, on the basis of which relief may be obtained from either the General Accounting Office or the courts.

On the other hand, the authority under which the boards have been created suggests strongly that they have authority to determine the claims for breach of contract. The first standard disputes clause for government contracts was drafted by an interdepartmental board and put into effect in 1926 (Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law and Contemporary

Fuller v. United States, 108 Ct. Cl. 70, 93-102, 69 F. Supp. 409; *Kehm Corp. v. United States*, 119 Ct. Cl. 454, 465-473, 93 F. Supp. 620. This problem has, to a large extent, been obviated by changes in standard clauses in government contracts.

Problems 39, 47-49 (1964)). The procedures followed under the clause were initially extremely informal; the present system of separate boards, following a quasi-judicial procedure, stems back to the establishment of the War Department Board of Contract Appeals in 1942 (Shedd, *op.cit.*, *supra*, at 49-55). Originally, this Board took a very limited view of its jurisdiction. This led Secretary of War Patterson, on July 4, 1944, to issue a memorandum directing the Board to exercise such authority as the Secretary of War himself might exercise when "deemed necessary or desirable to arrive at a just and equitable adjustment or disposition of the dispute involved in the appeal" (9 Fed. Reg. 9463). More specifically, the memorandum directed the Board to

Find and administratively determine the facts out of which a claim by a contractor arises for damages against the Government for breach of contract, without expressing opinion on the question of the Government's liability for damages.

(*Ibid.*; Shedd, *op.cit.*, *supra*, at 55-56). In 1949, when the present Armed Services Board of Contract Appeals (ASBCA) was established, its charter contained a similar provision regarding claims for "unliquidated damages."²² The present charter of the ASBCA gives the Board jurisdiction over any claim "cognizable under the terms of the contract,"²³ and permits the Board to make findings of fact with

²² The original ASBCA charter is set forth at 32 C.F.R. 30.1, Part I, Appendix A (1954).

²³ The present language was adopted in the charter effective May 1, 1962. 32 C.F.R. 30.1 Part I, Appendix A, para. 5 (1964 Supp.).

respect to claims not cognizable under the contract, "without expressing an opinion on the question of liability" (32 C.F.R. §30.1 Appendix A, Part I (1965)).

It is true that, despite the terms of its charter, the ASBCA has frequently refused to exercise its jurisdiction to make findings of fact which relate solely to "breach of contract" claims. As explained in *Simmel-Industrie Meccaniche Societa per Azioni*, A.S.B.C.A. No. 6141, 61-1 BCA ¶ 2917⁽¹⁹⁶¹⁾, a case which would have involved the added expense (1961) of hearings abroad:

Decisions by the Court of Claims have stated that it was not bound by findings of fact made by this Board in appeals involving breach of contract claims. * * * We cannot in good conscience compel the parties to undertake the great expense involved in presenting this matter before us when it must be admitted that our decision or findings of fact may be of no avail to either party.

However, the ASBCA does reserve the jurisdiction to make findings of fact in breach of contract cases where it deems it appropriate. The Board explained in the *Simmel-Industrie* decision: "We interpret our Charter and our Rules to mean that this Board will make findings of fact in [breach of contract] appeals where a hearing on the merits has been completed prior to the filing of a rule to show cause or a motion to dismiss." " Recently, the AEC Board

²⁷ See, e.g., *Armand Cassil*, A.S.B.C.A. No. 438 (June 8, 1950), and *Buttondez Corporation*, A.S.B.C.A. No. 2162 (February 24, 1956). See also *Morrison-Knudsen Co. v. United*

of Contract Appeals left open the question whether it would entertain claims for breach of contract. *Fick Foundry Co.*, AEC BCA No. 10-65, 65-2 BCA ¶3052. Thus this Board is apparently ready to reconsider its earlier decisions declining jurisdiction, referred to in the majority opinion below (R. 149). And a recent decision of the NASA Board of Contract Appeals apparently asserts jurisdiction for some purposes over claims for breach of contract. *Doyle and Russell, Inc.*, NASA BCA No. 51, 65-2 BCA ¶4912.

In sum, the administrative practice, like the decisions of the Court of Claims, does not preclude an application of the *Bianchi* decision to require administrative submission of factual disputes underlying claims against the government for breach of contract.

5. There is a final possible basis for the Court of Claims' assumption that facts cannot be settled administratively in connection with breach of contract claims. It is the court's apparent belief that, as to these claims, the officer or board to whom they would be presented could neither pay the claim nor require

States, 345 F. 2d 833, 835 (Ct. Cl. 1965), reviewing a decision of the Interior Department's Board of Contract Appeals which made findings of fact on a breach of contract claim over which it held that it had no jurisdiction to grant relief); *The Metrig Corp.*, A.S.B.C.A. No. 8455, 1963 BCA ¶ 3658 ("While the Board does not have jurisdiction to make a determination of liability in case of breach of contract or to reform a contract [the contractor argued that a misrepresentation in the invitation for bids was a breach of contract], the Board does have jurisdiction to examine the evidence and determine whether such evidence supports a conclusion of misrepresentation.")

payment by the government. *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 330, 77 F. Supp. 209, 212. In our view, this fact—even if true—should not be held to withdraw jurisdiction to decide the factual disputes which underlie breach of contract claims, so long as the facts in issue are of the kind committed to administrative determination by the contract. In addition, we believe that executive departments do in actuality have authority to pay claims for breach of contract once the facts underlying those claims have been established pursuant to the disputes clause.

The decisions of this Court make it clear that the general authority of executive departments to enter into and administer contracts includes the authority to settle and pay claims for breach of contract. In *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321, this Court held that a settlement entered into by the Chief of the Bureau of Steam-Engineering, Department of the Navy, in connection with the Navy's termination of a contract in violation of its terms, was binding on the government. Mr. Justice Field pointed out that there are many contingencies when the government finds it in the public interest to suspend work for which the government has contracted, and that "it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors" (91 U.S. at 323). A later case reached the same result in a claim for damages caused by unwarranted delay by the government—precisely the type of claim which the Court of Claims considered

in this case to be outside the authority of the executive departments to adjust under the standard disputes clause. This Court held that the contractor's release, executed in connection with a settlement in which the government paid the contractor \$60,000, precluded a suit by the contractor in the Court of Claims for delay damages. *United States v. William Cramp & Sons Ship & Engine Co.*, 206 U.S. 118.²⁸ This conclusion was reached despite the contractor's contention that its claims for "unliquidated damages arising from the breach of the contract on the part of the United States * * * were of such a character that the Secretary of the Navy had neither the right, authority, or jurisdiction to consider, adjust, or pay" (206 U.S. at 124).²⁹

²⁸ See also *Continental Illinois Nat. Bank. & Trust Co. v. United States*, 126 Ct. Cl. 631, 640-41, 115 F. Supp. 892, 897.

²⁹ The second *Cramp* case—*William Cramp & Sons v. United States*, 216 U.S. 494—has lengthy dictum to the effect that the executive departments may not settle claims for unliquidated damages (216 U.S. at 500-502). However, the Court's opinion made it plain that this dictum applied only where the parties do not follow a settlement procedure set forth in the contract (216 U.S. 502-503). The dictum has no application where the contract establishes a specific procedure—such as the disputes clause—for settling claims for unliquidated damages, and the parties follow this procedure. In the second *Cramp* case, the holding was that the Secretary of the Navy had authority to enter into a release *excepting* a claim for damages resulting from the government's delay. The Court stated, in reliance on the first *Cramp* decision, that "a release executed in accordance with the terms of the contract would have extinguished all claims" (216 U.S. at 503, emphasis added). The Court pointed out that the parties in the case before it had not followed specific procedures set forth in the contract for settling and releasing claims (216 U.S. at 502-503).

Indeed the Court of Claims has held, following *United States v. Corliss Steam-Engine Company*, *supra*, and the *Cramp* decision, and contrary to the views it expressed in this case, that the executive departments do have general authority to settle claims for breach of contract. *Cannon Construction Company v. United States*, 319 F. 2d 173 (holding claim for breach of contract barred by release given in connection with administrative settlement). Moreover, the typical government contract contains several standard clauses permitting the government to take action which would otherwise be a breach of contract, and explicitly authorizing the contracting officer to compensate the contractor for the resulting damage.³⁰ No one questions the authority of the executive departments to enter into contracts containing such clauses. Similarly, there should be no question as to the authority of the executive departments to grant contractors relief for any breach of contract by the government, in any case where the contractor obtains a favorable decision under the disputes clause procedure.

Finally, if the decision under the disputes clause is adverse to the government, and the executive

³⁰ For example, one standard clause permits the government to terminate the contract at any time for its own convenience, the contractor being compensated for expenses already incurred under the contract plus a percentage of profit on those expenses. 32 C.F.R. 8.701-704. Another standard clause permits the government to suspend the work at any time for its own convenience, making an equitable adjustment in the contract price to compensate the contractor for any additional expense. 32 C.F.R. 7.105-8.

agency cannot or will not pay, the contractor is free to present his claim to the General Accounting Office on the basis of the administrative findings and record. That office clearly has the authority to settle "[a]ll claims and demands whatever by the Government of the United States or against it." 31 U.S.C. 71. 44 Comp. Gen. 353.²¹ The contractor is also free to bring suit on the basis of the administrative findings and record, just as the government does where it sues affirmatively asserting breach of contract by the contractor. *E.g., United States v. Hamden Co-operative Creamery Co.*, 297 F. 2d 130 (C.A. 2); *Silverman Bros. v. United States*, 324 F. 2d 287 (C.A. 1). If the case is one in which, on the basis of the administrative decision, the executive department would pay if it deemed itself to have such authority, the claim can be paid as soon as the contractor files a complaint in the Court of Claims or a district court, without any further judicial proceedings. For at that point the Department of Justice assumes responsibility for the defense of the suit and has the unquestioned authority to settle the case. Sec-

²¹ The Comptroller General's decision announces a readiness to consider claims for breach of contract where the claim is for "the actual costs incurred in excess of the costs which reasonably would have been incurred but for the breach". 44 Comp. Gen. at 358. The Comptroller General further requires that the extra expense "can be administratively determined to a reasonably accurate degree of certainty." *Id.*, at p. 359.

In this decision, the Comptroller General takes the position—in reliance on the decision of the Court of Claims in the case at bar—that only his office has the authority to settle claims for breach of contract, and that the executive departments have no such authority.

tion 5, Executive Order No. 6166 (June 10, 1933);
5 U.S.C. 124-132.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below, permitting a judicial trial on facts relating to the claims in this case, should be reversed.

THURGOOD MARSHALL,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

DAVID L. ROSE,

ROBERT V. ZENER,
Attorneys.

FEBRUARY 1966.





COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 440

FILED

MAR 16 1966

JOHN F. DAVIS,

UNITED STATES OF AMERICA,

Petitioner,

vs.

UTAH CONSTRUCTION AND MINING CO.,

Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

GARDINER JOHNSON,

THOMAS E. STANTON, JR.,

221 Sansome Street,

San Francisco, California 94104,

Counsel for Respondent.

ALBERT L. REEVES, JR.,

J. G. SELWAY,

550 California Street,

San Francisco, California 94104,

RONALD LARSON,

221 Sansome Street,

San Francisco, California 94104,

Of Counsel.

Que

Stat

I

II

Sun

Subject Index

	Page
Questions Presented	1
Statement of the Case	2
I. Petitioner's contention that the administrative proceedings were "full dress adversary proceedings" is patently untrue as to the vital issues, since at every level of the administrative process there was a complete disclaimer of jurisdiction to consider the "breach of contract" phase of respondent's claims under the "disputes article"	3
A. The contracting officer's decisions determined that claims for damages for breach of contract were not properly before him for decision under the disputes article	6
B. Counsel for the government contended in formal written motions, by oral objections and in documented briefs that claims for damages for breach of contract could not be considered under the disputes article	7
C. The advisory board on contract appeals consistently ruled that it was without authority to consider or determine claims for damages for breach of contract	9
II. Petitioner's effort to characterize respondent's petition in the Court of Claims as simply a restatement of its series of administrative claims is improper and unfair, since the petition states a single, cumulative claim for damages for breach of contract	11
A. Respondent's petition in the Court of Claims does not seek a review of any administrative determination	12
Summary of Argument	13

	Page
Argument	17
I. One who asserts a claim for breach of contract is entitled to a judicial determination of the facts in a plenary hearing broad enough in scope to allow for the overlapping and interrelationship of the series of items constituting the claim: short of that, he is denied due process of law	17
A. The rigid time limitations upon the filing of claims for "changes," "changed conditions," and "delays-damages" produce a series of separate individual claims under a single contract	17
B. The administrative process results in a determination of the facts of a single claim within a narrow, limited context that is finely segmented and highly fragmented	19
C. The administrative processing of respondent's "pier drilling claim" exemplifies the unsuitability of the finely-segmented hearing concept to the determination of a series of overlapping or closely related claims	20
D. Respondent is entitled to a determination of the facts of its claim for breach of contract in a plenary hearing broad enough in scope to allow for the overlapping and interrelationship of the series of items constituting the claims	24
E. The determination of factual issues pertinent to the "breach of contract" aspect of respondent's claim within the narrow context of the finely segmented administrative hearing provides only an unsuitable, inadequate hearing which denies respondent that full and fair hearing required by due process of law	26
F. Respondent's petition in the Court of Claims is a direct application to the federal courts for unliquidated damages for an alleged breach of contract, and is not a request for a review of any administrative determination	28

SUBJECT INDEX

iii

Page

G.	To deny to respondent a judicial trial of its breach of contract claim, or to rule that the court—in this instance the Court of Claims—may not receive additional evidence on the issues embraced within the broad scope of such a trial, would constitute a denial of due process of law	30
II.	The “disputes article” of the contract does not provide that all factual matters connected with the contract be determined by the administrative process	32
A.	Petitioner’s present position is that factual issues underlying breach of contract claims can be resolved under the standard “disputes article”	32
B.	Petitioner’s present position is a repudiation of the assertions of the government at every stage of the administrative proceedings	33
C.	A history of the purpose and development of the pertinent contract clauses demonstrates that claims for damages for breach of contract must be pursued directly in the federal courts	34
D.	The administrative boards have recognized the distinction between disputes “arising under” the contract and those which are “connected with, but do not arise under” the contract	38
E..	The Court of Claims in its decision in this litigation, found no overwhelming reason for making a drastic change in government contract law at this time	39
F.	Respondent interprets this court’s decision in the <i>Bianchi</i> case as expressly limited to matters within the scope of the “disputes article” of the contract	40
G.	The answer to petitioner’s present position that questions of fact underlying claims for breach of contract “can be” resolved under the “disputes article” is that it does not authorize such a determination	42
Conclusion	44

Table of Authorities Cited

Cases and Decisions	Pages
Akron C. Y. Railway v. United States, 261 U.S. 184, 43 Sup. Ct. 260	30
Transcript of Record from the United States Court of Claims Pier Drilling Appeal No. 87, Findings of Fact and Recommendation (R., pp. 79-93)	22
Concrete Aggregate Claim No. 121, Contracting Offi- cer's Determination (R., p. 52)	22
Appeal of Utah Construction Company, No. 91 (R., p. 149)	9
Morgan v. United States, 304 U.S. 1, 58 Sup. Ct. 773.....	31
United States v. Carlo Bianchi & Co., 373 U.S. 709	40

Statutes, Rules of Court and Miscellany

Brief for the United States ..2, 3, 4, 11, 13, 18, 28, 29, 31, 32, 33, 42	
Kelly, Government Contractors Remedies: A Regulatory Re- form, 18 Ad. Law Rev. 145	31
Motion to Dismiss for lack of jurisdiction, Concrete Aggre- gate Appeal No. 121	23
10 C.F.R. Chapter 1, Part 3	20
United States Standard Form 23 Contract	17, 32
Wunderlich Act, 68 Stat. 81, 41 USC 231-232	29

In the Supreme Court
OF THE
United States

—
OCTOBER TERM, 1965
—

No. 440
—

UNITED STATES OF AMERICA,

Petitioner,

vs.

UTAH CONSTRUCTION AND MINING Co.,

Respondent.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT

—
QUESTIONS PRESENTED

Respondent believes that the issues involved in this proceeding and the questions presented may be stated more aptly and pointedly than is done by Petitioner in its "Brief for United States".

The following is respondent's view of the Questions Presented:

1. Is one who asserts a claim for breach of contract in the Court of Claims entitled to a determination of the facts in a judicial trial that is plenary in nature and

broad enough in scope to allow for the over-lapping and interrelationship of the series of items constituting the claim?

2. Does the "Disputes Article" of standard Government contracts require that all factual matters connected with the contract, regardless of the nature of the claim, must be tried and determined only by the administrative process?

STATEMENT OF THE CASE

Petitioner professes to set forth in its Brief a statement of the "Background," of the "Administrative Claims and Proceedings" and of the "Proceedings in the Court of Claims" sufficient to convey to this Court an understanding of the nature and scope of the administrative proceedings, of the manner in which the vital issues were processed and the record developed, and of the relationship of the administrative proceedings and their record to the pending proceeding in the Court of Claims. (Brief for U.S., pp. 6-14).

Strangely, that statement is completely devoid of any recital of the details of the manner in which the vital issues which are now the subject of this proceeding—the "breach of contract" phase of respondent's claims—were processed and disposed of administratively.

There is not one single word or sentence in Petitioner's statement that explains or sets forth how or in what manner the vital issue of the "breach of contract" aspects of respondent's series of administrative claims were considered and disposed of.

To rectify this glaring deficiency we will undertake to demonstrate, by the use of a few uncontradictable examples, that, at every level of the administrative process, there was an absolute and flat refusal to consider, hear or determine the "breach of contract" phase of respondent's claims. Uniformly they were rejected by sustaining objections, by granting motions to dismiss, and by a complete disclaimer of any jurisdiction to entertain them under the "Disputes Article" of the contract.

This refusal to hear, consider or determine the "breach of contract" aspects of the administrative claims was a uniform policy carried out by:

- (1) the contracting officer;
 - (2) the counsel for the Government; and
 - (3) the Advisory Board on Contract Appeals.
-

I. PETITIONER'S CONTENTION THAT THE ADMINISTRATIVE PROCEEDINGS WERE "FULL DRESS ADVERSARY PROCEEDINGS" IS PATENTLY UNTRUE AS TO THE VITAL ISSUES, SINCE AT EVERY LEVEL OF THE ADMINISTRATIVE PROCESS THERE WAS A COMPLETE DISCLAIMER OF JURISDICTION TO CONSIDER THE "BREACH OF CONTRACT" PHASE OF RESPONDENT'S CLAIMS UNDER THE "DISPUTES ARTICLE."

The Petitioner's Brief sets forth its own description and characterization of the administrative proceedings involved in this case in its "Administrative Claims and Proceeding" (Brief for U.S., pp. 7-10). It purports to summarize the tone and atmosphere of the administrative hearings in the following terms:

"The Board heard each matter in a *full-dress adversary proceeding*, with testimony, cross-examination, exhibits, briefs and argument. Where appropriate, the Board also viewed the construction site (R. 80-81, 102-103, 129). In regard to each matter, the Board ruled that its jurisdiction was clear and it rendered decisions, *with full discussion and findings* (R. 80, 102, 128; 78-93, 101-120, 127-137).'"* (at p. 9.)

Again, in relating the administrative procedure that disposed of the "Pier Drilling Claim," Petitioner states (at p. 19 of Brief for U.S.):

"The Board found, after a *full-scale adversary hearing*, that respondent had in fact encountered subsurface float rock constituting a changed condition within the meaning of Article 4."

Petitioner's ready reference to and heavy emphasis upon the "*full-dress*" and "*full-scale*" proportions of the "adversary proceedings" seems intended to allay any fear, and even any question, about the true nature and scope of the administrative proceedings before the Atomic Energy Commission's "Advisory Board on Contract Appeals."

Petitioner would fortify its contention that the administrative hearings were indeed "*full-dress*" and "*full-scale*" adversary proceedings by certifying that "in regard to each matter *the Board ruled that its jurisdiction was clear* and it rendered decisions with full discussion and findings". (Brief for U.S., p. 9)

*Throughout this brief, emphasis ours unless otherwise noted.

In view of these strong and reassuring representations as to the adequacy of the nature and scope of the administrative proceedings, it is strange that neither in its "Administrative Claims and Proceedings" nor anywhere else in Petitioner's Brief is there any accurate portrayal of the specific manner in which the controversial and vital issues raised by respondent's claims, and which are now before this Court, were discussed, considered and disposed of in the administrative hearings.

Admittedly, the crux of the important controversy presented by this case arose out of the "breach of contract" phase of respondent's Petition before the Court of Claims (R., pp. 4-14). Clearly, the problem to be decided by this Court is the proper method of considering and adjudicating the "breach of contract" aspects of the present claim as they are related to the "Disputes Clause" of the contract.

Yet, nowhere in Petitioner's Brief is there any statement of how, or whether this phase of respondent's present claim was considered and disposed of by the Advisory Board on Contract Appeals.

This deficiency in Petitioner's Brief is of the utmost significance. The complete omission of any discussion of this phase of the claim is obviously intentional and purposeful.

That is particularly true since there was discussion, consideration and decisional action on this controversial "breach of contract" phase of the claim at every stage of the administrative process. In each instance it was significant, meaningful discussion that was had and dispositive action that was taken.

A. The Contracting Officer's Decisions Determined That Claims for Damages for Breach of Contract Were Not Properly Before Him for Decision Under the Disputes Article.

A typical instance of the manner in which the "breach of contract" phase of the present claim arose and was disposed of during the administrative consideration of respondent's series of claims for equitable adjustment is found in the instance of the "Concrete Aggregate Claim."

In the presentation of that individual claim, the status in the administrative procedure of a claim for "damages for an alleged breach of contract" was first raised at the Contracting Officer's level. In his decision on the "Concrete Aggregate Claim" the Manager of the Idaho Operations Office, who was the Contracting Officer, made this pertinent Finding (R. p. 53):

"3. The Contractor's July 16, 1956 claim for additional compensation is predicated on a failure of the Commission to make available suitable concrete aggregate in accordance with the provisions of SC-18 of the contract and is therefore a claim for damages for an alleged breach of contract by the Commission which is not properly before me for consideration under the Disputes Article."

Consistently with that Finding, in his "Determination" (which was the Contracting Officer's Decision on this claim) he ruled (R., p. 56):

"DETERMINATION

As previously stated, it is my determination that your July 16, 1956 claim is a claim for damages for breach of contract which is not properly before me for consideration under the Disputes Article."

This example typifies the manner in which, at the Contracting Officer's level, any claim for damages for breach of contract was disposed of.

The Contracting Officer's position, as bluntly stated in every such instance, was that "a claim for damages for an alleged breach of contract by the Commission" was not properly before him for consideration under the "Disputes Article" and would not be heard or considered by him.

It cannot be contradicted that, at all times during the administrative proceedings, the Contracting Officer (who was the first decision making representative of the Government) asserted the legal position that the "breach of contract" phase of the various claims did not involve "disputes concerning questions of fact arising under this contract" and therefore could not be considered by him or processed under the "Disputes Article."

B. Counsel for the Government Contended in Formal Written Motions, by Oral Objections and in Documented Briefs That Claims for Damages for Breach of Contract Could Not Be Considered Under the Disputes Article.

The record of the processing of the "Concrete Aggregate Claim" also serves to demonstrate the manner in which counsel for the Government viewed and treated the "breach of contract" aspect of respondent's claims during the administrative hearings.

At that stage of the proceedings counsel for the Government were the "Attorneys for the Contracting Officer, USAEC, Idaho Operations Office, Idaho Falls, Idaho."

Counsel for the Government filed in that proceeding a "Motion to Dismiss for Lack of Jurisdiction." This motion was based solely upon their contention that the "Concrete Aggregate Claim" was in fact a "claim for damages for breach of contract."

The legal position then taken by the Government is so directly in conflict with that now being asserted before this Court by Government counsel that we quote the pertinent language of that Motion verbatim:

"The Contracting Officer . . . moves to dismiss for lack of jurisdiction the appeal of Utah Construction Company . . . for the reasons that:

1. The Contractor's claim is a claim for damages for breach of contract or breach of warranty.
2. The disputes clause of the subject contract limits the Hearing Examiner's jurisdiction to disputes 'concerning questions of fact arising under this contract'.
3. A claim for damages for breach of contract or breach of warranty is not a dispute concerning a question of fact arising under the contract.
4. The Contractor's claim may not be recognized as a claim for an equitable adjustment pursuant to Article 4. ('Changed Conditions') of the subject contract."

So that there might be no minimization of the staggering conflict and inconsistency in legal position between that asserted by the Government's counsel during the administrative hearings and that now being urged, we append a photostatic copy of the pertinent portions of the "Motion to Dismiss for Lack of Jurisdiction" to this brief. (*infra*, Appendix).

The Government cannot challenge respondent's assertion that throughout the entire gamut of the administrative procedure counsel for the Government contended by formal written motion, by oral objection, and in documented briefs that "claims for damages for breach of contract are not disputes concerning questions of fact arising under the contract and therefore cannot be considered under the Disputes Article."

C. The Advisory Board on Contract Appeals Consistently Ruled that It Was Without Authority to Consider or Determine Claims for Damages for Breach of Contract.

The Atomic Energy Commission's Advisory Board on Contract Appeals never wavered in its belief that it lacked jurisdiction to award general damages on claims for alleged breaches of contract. Its disclaimer of such jurisdiction was expressed in a controversy involving directly the contract which is the subject of this litigation. The decision referred to is the one entitled *Appeal of Utah Construction Company* (Docket No. 91) where the Board stated:

"It is clear, in the light of the Board's decision in *Appeal of Claremont Construction Company* (Docket No. 64), that, not only does the *Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract*. The Board has discussed this distinction at length in both that Claremont case and in *Appeal of Frontier Drilling Company* (Docket No. 74). The reasoning need not be repeated here. *As to this issue, the appeal should be dismissed as not within the jurisdiction of the Board.*"

This view was consistently enforced by the Board in the hearings on the series of claims which are the subject of this case. It was made manifest both in rulings on formal motions and on oral objections interposed when offers of proof were made.

It must be conceded, then, that the final, considered legal position of the Advisory Board on Contract Appeals was consistent with those of the Contracting Officer and counsel for the Government. Claims for damages because of alleged breaches of contract were not considered since they were not recognized as involving disputes concerning questions of fact arising under the respective contracts.

• • • • •

Another deficiency, or at least an inadequacy, of the "Brief for United States" is the failure of Petitioner to set forth any true picture or characterization of the nature of Respondent's Petition before the Court of Claims. This we believe to be basic to an understanding of the issues presented by this proceeding.

In the absence of any analysis or description of the nature and scope of that Petition in the "Brief for United States" we deem it essential to set forth at this point the following introductory characterization of respondent's basic pleading.

II. PETITIONER'S EFFORT TO CHARACTERIZE RESPONDENT'S PETITION IN THE COURT OF CLAIMS AS SIMPLY A RESTATEMENT OF ITS SERIES OF ADMINISTRATIVE CLAIMS IS IMPROPER AND UNFAIR, SINCE THE PETITION STATES A SINGLE, CUMULATIVE CLAIM FOR DAMAGES FOR BREACH OF CONTRACT.

In Petitioner's statement of the "Proceedings in the Court of Claims" (Brief for U.S., pp. 11-14) it persists in its effort to characterize respondent's Petition in the Court of Claims as simply a restatement of the series of five separate and independent claims as to which some basic facts have already been determined in administrative hearings. On this point it contends that:

"Respondent alleged substantially the same basic facts as those underlying its administrative pier drilling, shield window, shield door, and concrete aggregate claims." (at p. 11)

Properly, respondent's Petition is to be viewed as the statement of one single, cumulative claim for damages for breach of contract, rather than as a severable restatement of the series of individual claims presented before the administrative board. Respondent has not pleaded separate claims or a series of breaches of contract, but has spelled out the details of the series of acts and omissions which cumulatively constituted a breach of contract on the part of the Government for which it should respond in damages.

The charging allegations are contained in paragraphs 4 and 6 of the Petition (R., pp. 3-4). Paragraph 6 states, in part:

"6. As a result of plaintiff's detrimental reliance on said defendant's delays, misrepresentations and failures to perform in accordance with said contract

and its implied and express warranties, including, but not limited to, the acts of defendant with respect to major phases of said contract, hereinafter referred to, which independently and cumulatively constituted a breach of contract by defendant (sub-paragraphs 7(a), (b), (c), (d) and (e) herein)."

This point is to be emphasized, since the nature of the argument will point up the important legal implications of respondent's action in pleading a single, non-fragmented, non-segmented claim before the Court of Claims, in an effort to obtain for the first time a full and complete hearing in which all of its evidence may be heard and weighed simultaneously by a tribunal which is not restricted by artificial jurisdictional limits or by limitations based upon the sequence or narrow proximity of the time in which a series of legal rights were created by factual occurrences.

A. Respondent's Petition in the Court of Claims Does Not Seek a Review of Any Administrative Determination.

At various points in the "Brief for United States" Petitioner refers to respondent's Petition before the Court of Claims so as to convey the impression that the Petition seeks a *review* of the administrative decisions on respondent's series of claims for equitable adjustments.

This is not a fair representation or interpretation of either the Petition or the relief sought. Nowhere in the Petition is there any reference to or request for a *review* of any administrative decision.

Petitioner is confused and therefore misleads when it incorporates in its Brief statements such as this one:

“When respondent later asserted a claim for breach of contract in the Court of Claims based upon damages allegedly caused by construction delays resulting from the same changed conditions, respondent was not entitled to a second evidentiary hearing relating to the issue of whether construction delays had occurred. Under the disputes clause and the Wunderlich Act, this issue had been finally decided administratively *subject only to judicial review* for fraud or arbitrariness or for lack of substantial evidentiary support. *Such limited review*, under the *Bianchi* decision, ‘must rest solely on consideration of the record before the department’ (373 U.S. at 714). The Court of Claims decision ordering a judicial trial *de novo* on this class of issues was therefore error.” (Brief for U.S., p. 23)

Respondent’s Petition is an independent, direct application to the courts, specifically the Court of Claims, for damages for a breach of the contract. The Petition is not stated in terms of a review of administrative decisions, nor does it seek one.

This direct and independent application to the courts was, of course, based upon the fundamental legal position that actions for damages for breach of contract were not subject to the “Disputes Article” of the contract.

SUMMARY OF ARGUMENT

Petitioner’s present contention before this Court that claims for “breach of contract” are disputes concerning questions of fact arising under the contract within the meaning of the standard “Disputes Article” is an out-

right repudiation of the position taken at every stage of the administrative proceedings by every representative of the Government: (1) contracting officer; (2) counsel for the Government; and (3) the Advisory Board on Contract Appeals of the Atomic Energy Commission (see photostatic copy of the Government's "Motion to Dismiss for Lack of Jurisdiction", Appendix, *infra*.)

The rigid time limitations imposed by the pertinent contract clauses on "Changes", "Changed Conditions" and "Delays—Damages" require a contractor to file a written claim within a very few days after the happening of any occurrence that gives rise to a right under those clauses. Consequently a long series of separate, individual claims may be filed by a contractor in the course of the performance of a single Government contract.

The result is the breaking down of a claim that normally would be presented as one single cause of action in court litigation, into a series of finely-segmented, highly-fragmented individual claims. In the administrative process each segmented claim is considered and determined separately, without any relationship to or joint consideration with any other claim.

Respondent's Petition before the Court of Claims alleges one single cumulative claim for breach of contract, not a series of severable claims.

A contractor who has filed and presents to the Court of Claims a claim for breach of contract is entitled to have the facts of his claim heard and determined in an atmosphere and under a hearing concept that is broad enough in scope to encompass all phases and items of his

claim, including the most important element of providing for the consideration of the overlapping and close inter-relationship of the various items making up the claim.

The proposal of Petitioner that the factual issues pertinent to a claim for damages for breach of contract be determined within the narrowly restricted context of the finely-segmented administrative hearing would provide an unsuitable and inadequate hearing. Such a procedure would deny to the contractor alleging the claim for breach of contract that full and fair hearing which is essential to due process of law.

Respondent raises the issue of the denial of due process of law because of Petitioner's effort to compel it to present its "breach of contract" claim in the procedural straitjacket of the finely-segmented, highly-fragmented administrative hearing.

* * * * *

The "Delays-Damages clause" of the standard Government contract does not provide either an "equitable adjustment" or compensation for "any increase of cost." Consequently, a contractor who asserts that he has incurred unexpected additional costs because of Government-caused delays is compelled to sue in the Federal courts for unliquidated damages arising out of the breach of contract by the Government. The "Disputes Article" of the contract is not available for such claims.

Respondent's Petition before the Court of Claims is *not* a request for a review of any administrative decision. It is a direct and independent application to the Court of Claims for unliquidated damages for an alleged breach of contract.

A review of the administrative practice discloses that generally the administrative boards—including the Atomic Energy Commission's Advisory Board on Contract Appeals—have recognized the distinction between disputes “arising under” the contract and those which are “connected with, but do not arise under” the contract. The administrative boards have conceded that claims for breach of contract have not been committed to agency decision under the “Disputes Article.”

The Court of Claims, in its ruling in this litigation, stressed that the basis of its decision with respect to respondent's claim was a clear recognition of the delineation between disputed questions “arising under” the contract and those “which are connected with, but do not arise under” it.

Petitioner has failed to cite any persuasive reason for reversing the whole history of interpreting the “Disputes Article” of the contract.

Respondent's position before this Court with respect to the application of the *Bianchi* decision to the present litigation is the same as it was before both the Commissioner and the Court of Claims, namely: that the *Bianchi* decision must be interpreted as having recognized by its express terms the distinction between “matters within the scope of the ‘disputes clause’” and those which are not subject to it.

ARGUMENT

I. ONE WHO ASSERTS A CLAIM FOR BREACH OF CONTRACT IS ENTITLED TO A JUDICIAL DETERMINATION OF THE FACTS IN A PLENARY HEARING BROAD ENOUGH IN SCOPE TO ALLOW FOR THE OVERLAPPING AND INTER-RELATIONSHIP OF THE SERIES OF ITEMS CONSTITUTING THE CLAIM: SHORT OF THAT, HE IS DENIED DUE PROCESS OF LAW.

A. The Rigid Time Limitations Upon the Filing of Claims for "Changes", "Changed Conditions," and "Delays-Damages" Produce a Series of Separate Individual Claims Under a Single Contract.

This proceeding involves a consideration of only four of the articles or clauses of U. S. Standard Form No. 23 Contract. Those articles are set out in the Transcript of Record (R., pp. 15-18.) By article, number and title they are the following:

Article 3—Changes

Article 4—Changed Conditions

Article 9—Delays-Damages

Article 15—Disputes.

Even a cursory reading of those articles will serve to convince the reader that, if a contractor would avail himself of his rights under any one of them, he must act promptly and within rigidly restricted time limits. These rigid time limitations controlling effective use of the rights conferred by the respective sections are as follows:

Article 3—Changes: Claim must be asserted *within 10 days* after change is ordered.

Article 4—Changed Conditions: Notice of changed condition must be given *immediately*.

Article 9—Delays-Damages: Notice of Cause of delay must be given *within 10 days*.

Article 15—Disputes: Appeal must be taken *within 30 days*.

It is these rigid time limitations, requiring prompt action by the contractor in the form of the filing of a written claim within a very few days after the happening of a particular event or occurrence, that bring about a long series of separate, individual claims in the course of the performance of a single government contract.

The wary contractor, who would protect his rights, cannot wait to cumulate either his facts, his delays, or his damages. He must file promptly a series of individual, separate claims. They must be filed occurrence by occurrence, change by change, and delay by delay.

An understanding of these exceedingly rigid limitations on the time within which a claim under one of the pertinent contract clauses must be filed exposes as whole fiction the argument advanced by Petitioner (at p. 33 of Brief for U.S.) that:

“ . . . Surely the question of whether a factual dispute is one within the disputes clause should not turn on the kind of damages which a claim seeks. Again, this would give the party asserting the claim the choice of proceeding administratively or judicially according to the way in which he formulates his claim.”

There could be no choice, because any portion of a claim that was even close to the border-line of the “Disputes Article” would necessarily have to be filed administratively within ten or thirty days (depending upon the particular contract clause involved). There could be no hanging back on the part of the contractor, while he artfully decided which alternative was best suited to a maximum recovery. The passage of ten days (or thirty)

would eliminate any possibility of a choice of the administrative remedy.

At the least, the contractor would be required to file administratively within ten or thirty days any portion of his overall or total claim that related to any incident that had occurred or of which he had knowledge.

B. The Administrative Process Results in a Determination of the Facts of a Single Claim Within a Narrow, Limited Context That Is Finely-Segmented and Highly-Fragmented.

The inevitable result of this type of administration of contract disputes is the breaking down of a claim that, in normal court litigation, would be presented as one single cause of action, into a series of segmented, fractionalized, individual, separately stated and separately filed claims. They are separately and individually filed, numbered, docketed, and tried.

It is the "Disputes Clause" that provides the mechanics or implementation for the administration of the contract clauses referred to. The purpose is to provide for the contractor a solution that will be quick, fair, and relatively inexpensive. There is strong emphasis upon a speedy determination, since the contractor who files a claim must proceed, during the resolution of the controversy, with the work as ordered.

The strict limitations upon the time within which such claims had to be filed, and the emphasis upon an early resolution of the dispute, were some of the considerations that resulted in the development of an administrative hearing concept in which each claim or appeal was considered and determined separately, and without any rela-

tionship to or joint consideration with any other dispute or appeal, even other claims under the same contract.

This item by item system of considering and resolving claims was so thoroughly embodied in the Government administrative procedure by 1950 that no provision for or recognition of the consolidation of appeals, or even for contemporaneous hearings, was specified under the "Rules of Procedure of the United States Atomic Energy Commission Advisory Board of Contract Appeals" (10 C.F.R., Chapter 1, Part 3) that controlled the administrative hearings under the pertinent Atomic Energy Commission-Utah contract.

This finely-segmented and highly-fragmented characteristic of the administrative hearing under a government contract "Disputes Clause" has been an exceedingly important factor in the development of the severely restricted context or hearing concept under which only the facts that are directly and legally pertinent or relevant to the individual claim are presented, considered and determined.

C. The Administrative Processing of Respondent's "Pier Drilling Claim" Exemplifies the Unsuitability of the Finely-Segmented Hearing Concept to the Determination of a Series of Overlapping or Closely Related Claims.

The administrative practice of resolving disputes on a finely-segmented and highly-fragmented, item by item basis produces some absurd results under contracts where a long series of closely related claims have been filed separately (because of the time limitations), and then are presented and considered independently and without any

relationship to one another, and not even contemporaneously.

This situation is exemplified by the manner in which the Advisory Board on Contract Appeals processed respondent's "Pier Drilling Claim" (Docket No. 87) and "Concrete Aggregate Claim" (Docket No. 121). In its "Finding of Facts and Recommendation" in the "Pier Drilling Claim," (Docket No. 87) [R., pp. 79-93] the Board made references to the facts involved in the "Concrete Aggregate Claim," *which claim it conceded was not before it for consideration*. The Board's discussion of the two claims and their overlapping aspects was as follows:

"It appears from the record that *serious questions arose as to the quality of the Government furnished aggregate*. This resulted in substantial delays while test samples were poured and tested and while revisions in the proportions of cement and aggregate were decided on. Since the piers in question were the foundation for the entire structure, obviously pouring could not proceed until these matters were settled. *In the opinion of the Board, it was this dispute which delayed construction and not the drilling delays attributable to the 'float rock.'* But the Contractor's claims in the present proceeding are founded on its original letter of June 1, 1953, which referred only to subsurface conditions. While the Board, as indicated at the hearing, construes this letter as sufficient to raise the 'float rock' issue (although with less clarity than could be desired) *it certainly presented nothing as to the aggregate*. In fact, there is no indication that any claim based on the aggregate has been presented to the Contracting Officer. Under these circumstances, *delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding.*" (R., at p. 90.)

The Board then proceeded to make these "Findings of Fact," among others, in the "Pier Drilling Claim":

"10. . . . The Contractor, therefore, did encounter changed conditions within the meaning of Article 4.

11. This changed condition caused some delay in the drilling and excavating operations; *but, because of the delays caused by dispute over the quality of the aggregate, the drilling and excavating delays did not proximately cause delay in the construction of the building or in the final completion of the work.*" (R., pp. 92-93).

As was quoted above, the Board commented on April 30, 1957, that:

". . . There is no indication that any claim based on the aggregate has been presented to the Contracting Officer." (R., p. 90).

That statement is absolutely untrue, as is shown by the following portion of the Contracting Officer's determination in the "Concrete Aggregate Claim" (Docket No. 121.)

"By letter dated July 16, 1956, you presented to me for decision as Contracting Officer under Contract AT(10-1)-645 your claim for additional compensation in the amount of \$109,356.00, which sum you represent you were required to expend as a result of the 'Commission's failure to furnish concrete aggregate that would meet the contract specifications'." (R., p. 52)

So, there was a "Concrete Aggregate Claim" then pending, but as the Board commented:

"Delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding." (R., p. 90)

The Board proceeded, then, in its consideration of Docket No. 87, to deny one finely-segmented claim—the “Pier Drilling Claim”—on the basis that the exceedingly costly delays claimed in that docketed claim were caused by the “dispute over the quality of the aggregate”, which second separate and finely-segmented claim (Docket No. 121) was not before it for consideration or determination, and which it did not even know was then pending. (Finding 11, R., pp. 92-93)

It must be emphasized that, although the Advisory Board on Contract Appeals conceded that:

“the delays or expenses consequent upon the aggregate dispute are not before the Board in this proceeding”

it nonetheless actually determined the basic issue in the “Pier Drilling Claim” (Docket No. 87) on the basis of considerations involved in the “Concrete Aggregate Claim” (Docket No. 121), which not only was not before it, but in which no transcript of record was available to it.

No transcript of record was ever prepared on the “Concrete Aggregate Claim” because eventually it was ordered dismissed by a Hearing Examiner for failure to make a timely filing (R., pp. 64-76). No hearing on the merits of that claim was ever held. There is a transcript of record in the “Pier Drilling Claim” hearing.

It needs to be emphasized that the Advisory Board on Contract Appeals, in its consideration of the “Pier Drilling Claim” (Docket No. 87), was adhering to its uniform policy of excluding any evidence that related to the “breach of contract” aspects of the claim. Even so,

in its effort to hear and consider only the evidence pertinent to the request for an "equitable adjustment" it encountered the problem and difficulties related above that resulted from the overlapping nature and the close interrelationship of the "Pier Drilling Claim" and the "Concrete Aggregate Claim."

D. Respondent Is Entitled to a Determination of the Facts of Its Claim for Breach of Contract in a Plenary Hearing Broad Enough in Scope to Allow for the Overlapping and Interrelationship of the Series of Items Constituting the Claims.

It has been developed above that respondent's Petition before the Court of Claims alleges one single, cumulative claim for breach of contract, not a series of severable individual claims. (*Supra* p. 11.) Respondent has not pleaded a series of breaches of contract, but has spelled out in detail the series of acts and omissions which cumulatively constituted a breach of contract on the part of the Government.

As has been demonstrated by the foregoing review of the administrative processing of the "Pier Drilling Claim", some of them overlap and are closely interrelated.

In the instance of the "Pier Drilling Claim" and the "Concrete Aggregate Claim", they overlapped physically, since the work involved in both was performed in the same areas (at least in part). They also overlapped time-wise, because the delays incident to each occurred simultaneously (at least as to a portion of each).

That is not unusual on large and complicated construction projects where difficulties have been encountered, and it becomes necessary for the contractor to file a series of

individual claims in order to protect his rights to "equitable adjustment" or for compensation for "any increase of cost."

Respondent's point is that a contractor who has filed and presents to the Court of Claims a claim for breach of contract is entitled to have the facts of his claim heard and determined in an atmosphere and under a hearing concept which provides a plenary hearing broad enough in scope to encompass all phases and details of his claim, including the most important element of providing for the consideration of the overlapping and close interrelationship of the various items making up the claim. Unless a hearing that broad in scope is provided, and unless the facts are considered and determined under a hearing concept that is that plenary, he has in effect had no hearing at all. Without that broad and unlimited a scope to the hearing he has been denied that full and fair hearing that is his right.

It must be obvious that factual determinations could, and normally would, vary greatly under a situation where the scope of the hearing was as narrow and the admissibility of evidence as restricted as in the one single "Pier Drilling Claim", isolated from all of the other administrative claims of respondent, and the condition that would prevail in the Court of Claims, or any other Federal Court, where respondent would be allowed to present any relevant evidence in support of its broad claim for damages for breach of contract. Important differences would result.

The scope of the two hearings would be different: obviously the scope of the trial in the Court of Claims

would be broader and would encompass both issues and evidence that would not be pertinent or admissible under the narrower and more limited scope of the finely-segmented and highly-fragmented administrative hearing.

The evidence admissible would be substantially different. Any evidence that relates in any way to any one *or more* of the individual items or acts pleaded in support of the alleged breach of contract will be admissible in the Court of Claims trial, as contrasted with the narrow evidentiary restrictions of the finely-segmented administrative hearing.

E. The Determination of Factual Issues Pertinent to the "Breach of Contract" Aspect of Respondent's Claim Within the Narrow Context of the Finely Segmented Administrative Hearing Provides Only an Unsuitable, Inadequate Hearing Which Denies Respondent That Full and Fair Hearing Required by Due Process of Law.

Respondent submits that, having pleaded a claim for damages for breach of contract, it was entitled to pursue this remedy directly to the Federal Courts, in this instance the Court of Claims (see *infra*, p. 28), which it did. With its claim for damages properly before the Court of Claims it is entitled to have the facts determined there under a hearing concept that is broad enough to encompass all of the evidentiary details that support every item and facet of its claim.

It is no answer to repeat again and again (as Petitioner does) that this proceeding presents:

"facts previously determined administratively . . ."

"factual issues previously determined . . ."

"factual issues previously administratively determined . . ."

"factual issues in this case which have previously been administratively resolved . . ." (Brief for U.S., pp. 21-23.)

The deficiency in that reasoning is that those prior determinations (so-called) were made in a hearing context that was finely-segmented and the scope of which was, therefore, narrowly restricted so as not to provide a plenary hearing broad enough in scope to encompass all of the evidentiary matters properly pertinent to the claim for damages for breach of contract.

Evidence that would be properly admissible in the "breach of contract" action was not admissible in the restricted administrative hearing. There was no provision for hearing or considering administratively the overlapping features of other claims or even those portions of claims that were closely inter-related.

Further, respondent is entitled to present in the "breach of contract" trial any evidence that tends to prove that the details of the series of incidents alleged as constituting the breach were such that, when their cumulative or overall effect and implications were weighed, there resulted in the mind of the trier of the facts a conclusion that there was in fact a disregard of Petitioner's contract obligations, and that, therefore a breach of contract had been committed.

Clearly a finely-segmented, narrowly restricted administrative type of hearing would be wholly unsuitable and inadequate to provide even an opportunity for respondent to attempt to make such a showing by proper evidence.

To have determined a fact in the hearing on the "Pier Drilling Claim" cannot possibly be claimed to have pro-

vided respondent an opportunity to make the kind and scope of a factual presentation that it can make under the broad scope of the "breach of contract" trial. The administrative hearing must be held to be unsuitable and inadequate for the factual issues involved in "breach of contract" claims.

To limit respondent to the narrow, fragmented type of hearing provided by the administrative process, and then to hold that, the facts presented there having been determined, respondent may not re-try any of those facts *de novo* in a court trial on a "breach of contract" claim is to deny to respondent that fair and full hearing which due process of law requires.

There is no question that Petitioner contends that the procedure just referred to is the proper one. It states exactly that:

"Once the facts underlying either of these legal verbalizations of the claim have properly been determined administratively there is no reason whatever to undertake de novo litigation of those facts merely because the contractor arrives at a different legal formulation of a claim based on the same facts."
(Brief for U.S., p. 25)

F. Respondent's Petition in the Court of Claims Is a Direct Application to the Federal Courts for Unliquidated Damages for an Alleged Breach of Contract, and Is Not a Request for a Review of Any Administrative Determination.

It has been pointed out earlier (*supra*, p. 12) that a careful study of respondent's Petition before the Court of Claims shows that it does not state a request for a *review* of any administrative decision. There is no reference to or request for a review of any administrative decision.

Respondent's Petition is a direct and independent application to the Federal Court, in this case specifically the Court of Claims, for unliquidated damages for an alleged breach of contract.

This proper interpretation and characterization of the Petition before the Court of Claims is particularly important in view of Petitioner's constant reference to the "finality" accorded by the "Disputes Article" and the Wunderlich Act, 68 Stat. 81, 41 U.S.C. 231-232. (Brief for U.S., pp. 21-27.) Typical of Petitioner's many references to this subject is the following:

"In addition, courts of appeals have also uniformly given administrative findings of fact properly rendered pursuant to the disputes clause the finality accorded by that clause and the Wunderlich Act, regardless of the conceptual nature of the judicial claim involved." (Brief for U.S., pp. 26-27.)

Respondent asserts that Petitioner's analysis and understanding of the Petition before the Court of Claims is erroneous. Its contention as to "finality" of the administrative determination of factual issues is predicated upon a false basis.

Since the proceeding in the Court of Claims on respondent's Petition is a direct, original application, not a request for a review of an administrative ruling, it is submitted that the applicable rules vary materially from those cited by Petitioner as to "finality". Unless and until respondent has been provided a determination of the facts involved in its "Breach of Contract" claim in a plenary hearing broad enough in scope to encompass all phases and facets of its claim, even the overlappings and

inter-relationships of the items making it up, it has been denied that fair and full hearing required by due process of law.

G. To Deny to Respondent a Judicial Trial of Its Breach of Contract Claim, or to Rule That the Court—in This Instance the Court of Claims—May Not Receive Additional Evidence on the Issues Embraced Within the Broad Scope of Such a Trial, Would Constitute a Denial of Due Process of Law.

Respondent here raises specifically the issue of the denial of due process of law if the position of Petitioner should be supported.

A contractor who asserts in the Federal courts—here the Court of Claims—a claim for unliquidated damages for an alleged breach of contract has a right to have his claim considered at a hearing that is fair and full: short of that, he has been denied that procedural or administrative due process of law which is his constitutional right.

Respondent raises the issue of the denial of due process of law because of the effort to compel it to present its “breach of contract” claim in the procedural straitjacket of the finely-segmented, highly-fragmented administrative hearing. As to a “breach of contract” claim such a hearing is, as we have developed above, neither fair nor full.

Pertinent to this point is the comment of Mr. Justice Brandeis in *Akron, C.Y. R’y. Co. v. United States*, 261 U.S. 184, 200; 43 Sup. Ct. 260, 277:

“Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which

ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

The procedure proposed by Petitioner does not, it is submitted, conform to the standard exacted by this Court, speaking through Chief Justice Hughes in *Morgan v. United States*, 304 U.S. 1, 19; 58 Sup. Ct. 773, 777:

"Congress, in requiring a 'full hearing' had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature. . . . The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

Within the broad principles of due process of law enunciated by those decisions, it is clear that respondent's right to due process of law would be denied should this Court accede to the request of Petitioner, as stated in its "Conclusion" (Brief for U.S., p. 54) that:

"The decision below, permitting a judicial trial on facts relating to the claims in this case, should be reversed."

II. THE "DISPUTES ARTICLE" OF THE CONTRACT DOES NOT PROVIDE THAT ALL FACTUAL MATTERS CONNECTED WITH THE CONTRACT BE DETERMINED BY THE ADMINISTRATIVE PROCESS.

A. Petitioner's Present Position Is That Factual Issues Underlying Breach of Contract Claims Can Be Resolved Under the Standard "Disputes Article."

In the second portion of its Brief, Petitioner argues that claims for breach of contract are disputes concerning questions of fact arising under the contract within the meaning of the "Disputes Article" of U. S. Standard Form No. 23 Contract. It seeks to state its exact position in this respect as adroitly as is possible by emphasizing the factual phase or "factual issues" of breach of contract claims, and ignoring completely, as if they did not exist or were unimportant, the legal issues that are the basic elements of a claim for unliquidated damages arising out of an alleged breach of contract.

Precisely, this is the way Petitioner states its contention:

"A claim for 'breach of contract' involves an assertion of rights and duties created and defined by the contract. In this case, for example, respondent asserts that the government failed to fulfill duties imposed upon it by the contract. *Since the rights and duties which govern the claim are created and defined by the contract, we believe that the factual disputes pertaining to the claim are disputes 'arising under' the contract amenable to resolution under the standard disputes clause of the contract.*" (Brief for U.S., pp. 29-30)

Proceeding along that line of reasoning, Petitioner next asserts:

"... We believe that the language 'all disputes concerning questions of fact arising under this contract' *can be* applied to facts underlying all asserted rights and duties created by the contract—including the assertion of remedies for 'breach of contract'." (Brief for U.S., p. 30)

The thrust of Petitioner's argument on this point, as well as its weakness, is exposed by another statement that breach of contract claims "*can be*" resolved under the "Disputes Article." This is its repetition of that hope:

"In our view, questions of fact underlying claims for breach of contract *can be* resolved under the standard disputes clause, at least where those facts (as they are in this case) are of the kind similar to those committed to administrative determination by contract clauses such as those according administrative relief for 'changed conditions,' 'changes' and 'delays-damages.' " (Brief for U.S., p. 28)

B. Petitioner's Present Position Is a Repudiation of the Assertions of the Government at Every Stage of the Administrative Proceedings.

Petitioner's present contention before this Court that claims for breach of contract are disputes arising under the contract within the meaning of the standard "Disputes Article" completely repudiates and seeks to abandon the position asserted by counsel for the Government at every stage of the administrative hearings (as we have demonstrated at pages 6-10, *supra*).

Petitioner's present position is a direct reversal of the Government contention before the Advisory Board on Contract Appeals. Everything that was said there by

counsel for the Government now stands repudiated (see photocopy of the Government's "Motion to Dismiss for Lack of Jurisdiction", Appendix, *infra*).

A reading of the Brief for United States (at pp. 27-54) convinces one that Petitioner's counsel have attempted to justify and rationalize their startling shift in position by allowing themselves to become so enmeshed in the task of reconciling or distinguishing prior precedents (most of which cannot be reconciled) that they have either overlooked or forgotten the rudimentary legal principles and the rather short history of experience that explain and account for the development of the pertinent clauses of the contract.

C. A History of the Purpose and Development of the Pertinent Contract Clauses Demonstrates That Claims for Damages for Breach of Contract Must Be Pursued Directly in the Federal Courts.

More than three-quarters of a century of experience under Government construction and supply contracts had demonstrated that the Government was severely handicapped, in defense and other emergency construction programs, by its inability to make changes in design or changes in the scope of the contract work during the performance of the work without exposing itself to both stoppages of work and long-drawn-out damage suits for alleged breaches of contract.

Similarly, where the site conditions that were actually encountered were not as represented by the plans and specifications, contractors asserted "changed conditions" and threatened to stop work and sue for damages for breach of contract.

To protect the essential Government need to keep these vital construction projects moving, there have been developed a series of standard contract clauses (including Article 3—Changes and Article 4—Changed Conditions) that have conferred upon the Government unusual rights to rewrite a contract during its performance and to do other things which, under any normal contract, would otherwise be viewed as clear breaches of contract. These clauses also made it possible for the Government to keep the work going without interruption on its construction and supply contracts.

The quid pro quo for the contractor was provided in the form of an assurance that he would have the right to an "equitable adjustment" or compensation for "any increase of cost." This right he was given in lieu of the normal right to sue in the courts for damages for breach of contract.

The "Disputes Article" provided the mechanics by which disagreements could be resolved speedily at the administrative level.

Under this procedure that was developed the "equitable adjustment" or compensation for "any increase of cost" was the substitute for the ordinary right to sue for damages for breach of contract. Only in those specific cases where one of the newly-developed clauses provided that the contractor should have the right to obtain an "equitable adjustment" or compensation for "any increase of cost" under the administrative process did he surrender his right to sue in the courts for damages for a breach of contract.

The "Changes clause" (Article 3) provided specifically for an "equitable adjustment". The "Changed Conditions clause" (Article 4) provided for compensation for "any increase of cost."

Significantly, the "Delays—Damages clause" (Article 9) provided neither "equitable adjustment" nor for "any increase of cost." It merely provided for extensions of time for Government-caused delay. Consequently, through the years since these special clauses have been incorporated into standard Government contracts, a contractor who asserted that he had incurred unexpected additional costs because of Government-caused delays was compelled to sue in the courts for unliquidated damages arising out of the alleged breach of contract on the part of the Government. No other form of monetary relief was made available to him by "Article 9: Delays-Damages" or any other clause of the contract. Consequently the "Disputes Article" has not been available in these instances.

That the above recital is a proper interpretation and an accurate, though brief, statement of the history of the development of the pertinent contract clauses is corroborated by the following portion of a current article in 18 *Ad. Law Rev.* 145, written by one who has participated in the administrative process as a Government representative (Kelly, *Government Contractors' Remedies: A Regulatory Reform.*):

"Over the years the ASPR Committee has developed, in conjunction with other government agencies, a variety of standard contract clauses that permit the Government to do things as a contracting party that would otherwise constitute a breach of contract. For example, under the 'Changes' clause the Government

may rewrite essential terms of a contract during the course of performance; make design changes, order additional work. Under the Government (Furnished) Property clause the Government may delay the delivery to the contractor of promised government materials necessary for performance. Such extraordinary contractual prerogatives serve the public interest, and the Government is, of course, willing to pay for them. Thus, the variety of special contract clauses I speak of entitle the contractor to an 'equitable adjustment' in his contract price whenever the Government, acting within the scope of these clauses, changes or otherwise fails to live up to the original bargain.

The Disputes procedure implements these clauses. It affords contractors a fair, speedy, and inexpensive method of obtaining resolution of disagreements that may arise in the application of these equitable adjustment provisions. And it assures the Government of uninterrupted performance by the contractor while the dispute is being resolved.

Due to the increasing use of equitable adjustment clauses, and their elaboration by the contract appeals boards (for example, the constructive change order doctrine), it has become difficult for the Government to 'breach' one of its standard procurement contracts. However, *there remain some potential government breaches for which administrative relief under the contract by way of a price adjustment has not been made available. Because they have not been made the subject of a price adjustment clause in the contract, when these government breaches occur and the contractor seeks redress the standard disputes procedure is by definition inapplicable. The boards of contract appeals have no effective jurisdiction, since they are limited by the standard disputes clause to deciding*

contractor claims for which relief is available under the terms of the contract.

These claims that arise outside the contract and are beyond the board's jurisdiction must be pursued by the contractor directly in the federal courts."

D. The Administrative Boards Have Recognized the Distinction Between Disputes "Arising Under" the Contract and Those Which Are "Connected With, But Do Not Arise Under" the Contract.

The administrative boards have generally recognized the distinction between disputes "*arising under*" the contract and those which are "*connected with, but do not arise under*" the contract. With rare exceptions the administrative boards have always conceded that claims for damages for breach of contract were not committed to agency decision under the "Disputes Article."

Petitioner has not been able to cite any respectable or convincing examples of administrative practice in which there has been any departure from the position taken by the Atomic Energy Commission's Advisory Board on Contract Appeals in the *Appeal of Utah Construction Company* (Docket No. 91), which held:

"It is clear, in the light of the Board's decision in *Appeal of Claremont Construction Company* (Docket No. 64), that, not only does the Contractor's appeal on the issue of damages raise issues solely of law, but that this dispute is as to a matter 'relating to' and not one 'arising under' the contract. The Board has discussed this distinction at length in both that *Claremont* case and in *Appeal of Frontier Drilling Company* (Docket No. 74). The reasoning need not be repeated here. As to this issue, the appeal should

be dismissed as not within the jurisdiction of the Board." (R., p. 149)

The administrative practice has been to recognize a clear distinction between claims "*arising under*" and those "*relating to*" the contract. Petitioner has demonstrated no reason for varying that practice.

E. The Court of Claims in Its Decision in This Litigation, Found No Overwhelming Reason for Making a Drastic Change in Government Contract Law at This Time.

The Court of Claims' decision, both in the majority opinion, and in the concurring portion of Judge Davis' opinion, stressed that the basis of its ruling with respect to respondent's claims was a clear recognition of the delineation between disputed questions "*arising under*" the contract and those which are "*connected with, but do not arise under*" it. The following selection from Judge Davis' concurrence states aptly the point of view urged upon this Court by respondent:

"... [T]he finality of such findings has been recognized only when the board was considering a contractor's request under some contract provision (like the Changes, Changed Conditions, Termination for Default or for Convenience, or Suspension of Work articles) expressly authorizing the agency to grant an adjustment in price or other specific relief in defined circumstances. These alone are disputed questions '*arising under*' the contract. Exhaustion of the administrative remedy has not been required and *finality has not been accorded where the facts relate to a type of claim, such as for a breach [fol. 181] which the contract does not commit to agency determination. Those disputes are connected with, but do not arise under, the contract. The administrative board*

can give no relief under the contract, and therefore cannot finally decide the facts." (R., p. 156.)

Respondent submits that the determination of the Court of Claims was a sound, well-reasoned one, entirely consistent with the purposes of the pertinent clauses of the contract. Petitioner has failed to cite any persuasive reason for reversing the whole history of interpreting the "Disputes Article." As Judge Davis commented:

"We have been presented with no . . . overwhelming reason for making this drastic change in Government contract law at this time." (R., p. 158.)

F. Respondent Interprets This Court's Decision in the Bianchi Case as Expressly Limited to Matters Within the Scope of the "Disputes Article" of the Contract.

Respondent shares the Court of Claims' view of the limitations upon this Court's decision in *United States v. Carlo Bianchi*, 373 U.S. 709. It is respondent's interpretation that this Court expressly and very carefully limited its ruling there to "matters within the scope of the disputes clause."

Respondent's position before this Court with respect to the application of the *Bianchi* decision (*supra*) to the present litigation is the same as it was before both the Commissioner and the Court of Claims itself. That position was based upon those two selections from the *Bianchi* decision which were quoted by the Court of Claims in the following excerpts:

"The Supreme Court's opinion in *Bianchi*, *supra*, restricting the evidence to be considered by this court to the record before the Appeals Board, is expressly limited to 'matters within the scope of the disputes clause.' At page 714 the Court said:

'Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. * * *

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.'

Finally, in conclusion, the Court said:

" * * * We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to [fol. 171] review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence * * * [373 U.S. 709, 718]'

The opinion of the Supreme Court was thus restricted to 'matters within the scope of the disputes clause.' An action for breach of contract is not within the scope of this clause." (R., pp. 145-146.)

The *Bianchi* decision must be interpreted, it is submitted, as having recognized by its express terms the distinction between "matters within the scope of the 'disputes clause' " and those which are not subject to it.

As has been shown by a brief review of the history of the development of the "Changes clause", the "Changed Conditions clause", the "Delay-Damages clause" and the

"Disputes clause", this distinction is one that is supported both by reason and by fairness to the parties to the contract. It should continue to be recognized and enforced by the Courts.

G. The Answer to Petitioner's Present Position That Questions of Fact Underlying Claims for Breach of Contract "Can Be" Resolved Under the "Disputes Article" Is That It Does Not Authorize Such a Determination.

A thoughtful analysis of the process of reasoning displayed in the "Brief for United States" persuades one to the belief that Petitioner has become so hopelessly bogged down in its effort to cite, and then either to reconcile or distinguish the myriad of individual cases cited therein that in the end its argument leads it into a legal cul-de-sac. Its argument fails to produce, or even to indicate, any real conclusion. It seems, indeed, to end its tortuous legalistic journey asking itself questions. That this is true is exemplified by the following representative excerpts:

"In our view, questions of fact underlying claims for breach of contract *can be* resolved under the standard disputes clause, at least where those facts (as they are in this case) are of the kind similar to those committed to administrative determination by contract clauses such as those according administrative relief for 'changed conditions,' 'changes' and 'delay-damages.'" (Brief for U.S., p. 28)

and

"In sum, the administrative practice, like the decisions of the Court of Claims, *does not preclude* an application of the *Bianchi* decision to require administrative submission of factual disputes underlying claims against the government for breach of contract." (Brief for U.S., p. 49)

The obvious answer to these questions that Petitioner is still found asking of itself is that the contract—in the “Disputes Article”—did not provide for such an authority or jurisdiction in the administrative agencies.

It may well be that:

(1) “questions of fact underlying claims for breach of contract *can be* resolved under the standard disputes clause . . .”.

and that

(2) “the administrative practice, like the decisions of the Court of Claims, *does not preclude* an application of the *Bianchi* decision . . .”.

Those possibilities may be true, but the pertinent contract clauses do not, and never have, spelled out authorization that any such jurisdiction should be exercised by the administrative process provided under the “Disputes Article.”

Thus, in the end, Petitioner finds itself in the unhappy and inconclusive position of seeking to repudiate a position that the Government and all of its representatives have held fast to at every prior stage of the proceedings.

It now wants to change the rules of decision-making in the middle (approximately) of this lengthy litigation, and it points out “in sum” that what it now desires “*can be*” done under the “Disputes Article” and that the administrative practice to date “*does not preclude*” it.

The clear, irrefutable answer is that the method of decision-making that Petitioner now, for the first time, prefers, was never authorized or provided for by the pertinent contract.

Every administrative or judicial body that has considered the problem in a thoughtful, reasoned manner has rejected Petitioner's present preference. To cite a myriad of cases, to develop that there exist conflicts and contradictions among them, and then to wind up asking questions aloud, which is what Petitioner's Brief does, simply means, as Judge Davis of the Court of Claims commented (R., p. 158), that:

"We have been presented with no . . . overwhelming reason for making this drastic change in Government contract law at this time."

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision below, permitting a judicial trial according to the order and manner of proof established by the Court of Claims, should be affirmed.

Dated, March 14, 1966 at San Francisco, California.

Respectfully submitted,

GARDINER JOHNSON,

THOMAS E. STANTON, JR.,

Counsel for Respondent.

ALBERT L. REEVES, JR.,

J. G. SELWAY,

RONALD LARSON,

Of Counsel.

(Appendix Follows)

UNITED STATES ATOMIC ENERGY COMMISSION

HEARING EXAMINER

FOR

CONTRACT APPEALS

DOCKET NO. 121

APPEAL OF

UTAH CONSTRUCTION COMPANY

UNDER

CONTRACT NO. AT(10-1)-645

MOTION TO DISMISS

FOR

LACK OF

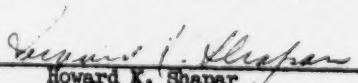
JURISDICTION

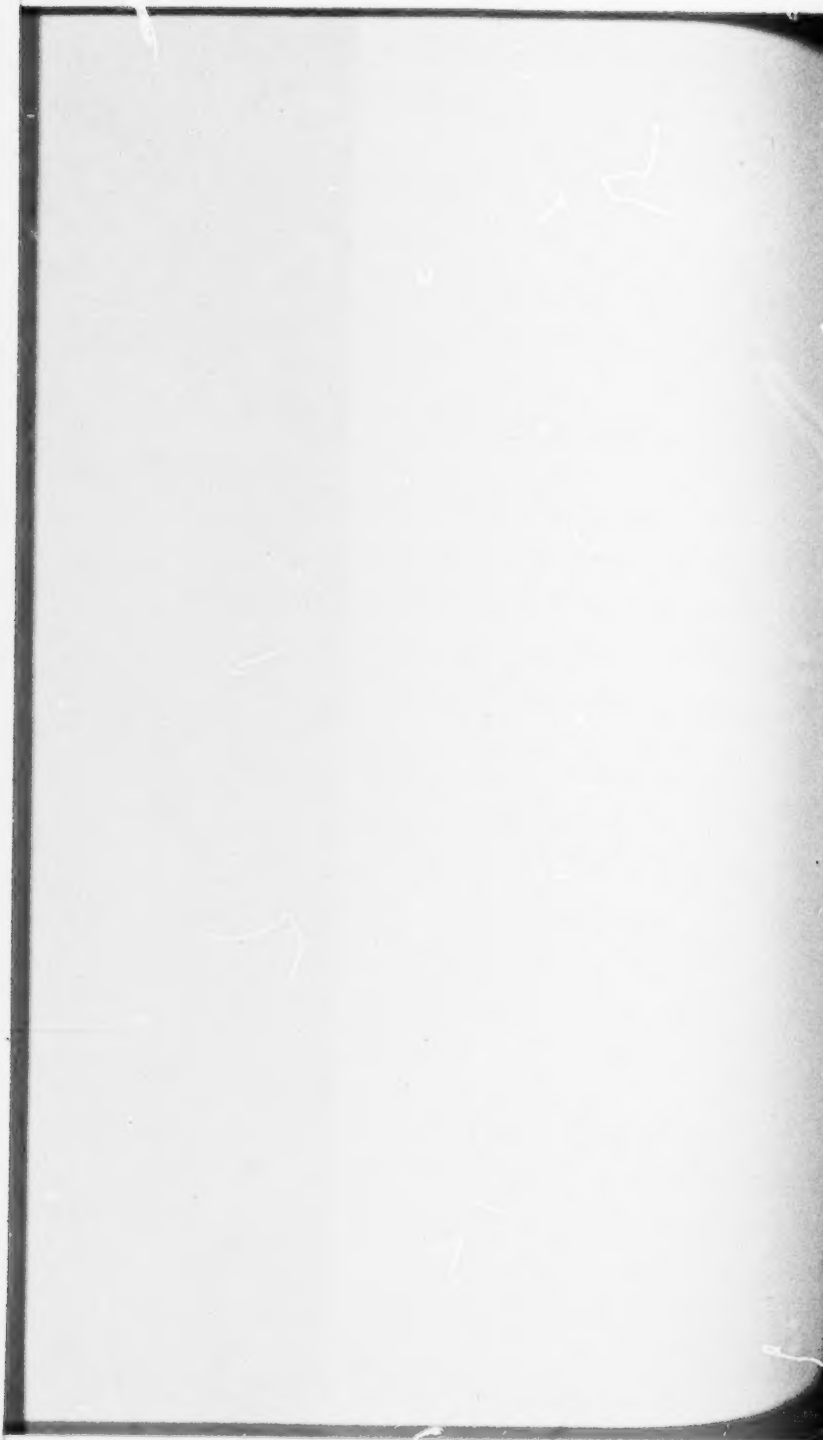
The Contracting Officer for the United States Atomic Energy Commission (hereinafter referred to as the "Commission"), Idaho Operations Office, Idaho Falls, Idaho, respectfully moves the Hearing Examiner to dismiss for lack of jurisdiction the appeal of Utah Construction Company (hereinafter referred to as the "Contractor") for the reasons that:

1. The Contractor's claim is a claim for damages for breach of contract or breach of warranty.
2. The disputes clause of the subject contract limits the Hearing Examiner's jurisdiction to disputes "concerning questions of fact arising under this contract".
3. A claim for damages for breach of contract or breach of warranty is not a dispute concerning a question of fact arising under the contract.
4. The Contractor's claim may not be recognized as a claim for an equitable adjustment pursuant to Article 4. ("Changed Conditions") of the subject contract.

* * * * *

Without prejudice to any other motion the Contracting Officer may present, it is hereby requested that the Hearing Examiner render a decision on this motion prior to taking any other action with respect to this appeal.


Howard K. Shapar
Attorney for the Contracting Officer
USAEC, Idaho Operations Office
Idaho Falls, Idaho



UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

INDEX

	Page
QUESTIONS PRESENTED	1
INTEREST OF AMICUS CURIAE	2
ARGUMENT	3
Introduction and Summary	3
PRELIMINARY POINTS	5
1. The Issue Is Contract Interpretation	6
2. Proceedings Before a Contract Appeals Board Are Arbitral Not Administrative	12
3. Petitioner Misapprehends the Issue and Hold- ing in <i>United States v. Carlo Bianchi</i> , 373 U.S. 709 (1963)	15
I. REFUTATION OF PETITIONER'S ARGUMENT ON THE FIRST ISSUE	18
II. REFUTATION OF PETITIONER'S ARGUMENT ON THE SEC- OND ISSUE	28
(a) Court of Claims Cases	36
(b) Administrative Practice	36
CONCLUSION	38
APPENDIX	1a
Address by J. E. Welch, Deputy General Counsel, General Accounting Office, before Government Con- tracts Committee, D. C. Bar Association, January 13, 1966, on Unliquidated Damage Claims for Breach of Contract.	

CITATIONS

CASES:

<i>Allied Paint & Color Works v. United States</i> , 309 F. 2d 133 (2d Cir. 1962)	27
<i>Climatic Rainwear Co. v. United States</i> , 115 Ct. Cl. 520, 88 F. Supp. 415 (1950)	7
<i>Cooke v. United States</i> , 91 U.S. 389 (1875)	13

	Page
<i>Cramp & Sons v. United States</i> , 216 U.S. 494 (1915) ..	6
<i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134 (1940)	15
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 (1961), <i>reh. den.</i> , 377 U.S. 934 (1963)	23
<i>Kihlberg v. United States</i> , 97 U.S. (7 Otto) 398	12
<i>McWilliams Dredging Co. v. United States</i> , 118 Ct. Cl. 1 (1950)	8
<i>Morrison-Knudsen v. United States</i> , 345 F. 2d 833 (Ct. Cl. 1965)	27, 29, 34, 38
<i>Perry v. United States</i> , 294 U.S. 330 (1935)	13
<i>Phoenix Bridge Co. v. United States</i> , 85 Ct. Cl. 603 (1937)	24, 36
<i>Potashnick v. United States</i> , 123 Ct. Cl. 97 (1952)	32
<i>Silverman Bros., Inc. v. United States</i> , 324 F. 2d 287 (1st Cir. 63)	27
<i>United States v. Adams</i> , 74 U.S. (7 Wall.) 463 (1868) ..	7
<i>United States v. Anthony Grace & Sons</i> , No. 439, Octo- ber Term 1965 (Petitioner's Brief)	22
<i>United States v. Carlo Bianchi</i> , 373 U.S. 709 (1963) 5, 15, 16, 17, 19, 20, 28, 35	
<i>United States v. Hamden Co-op Creamery Co.</i> , 297 F. 2d 130 (2d Cir. 1961)	27
<i>United States v. Moorman</i> , 338 U.S. 457 (1950)	9, 11
<i>United States v. Morgan</i> , 313 U.S. 409 (1941)	15
<i>United States v. Peter Kiewit Sons Co.</i> , 345 F. 2d 879 (8th Cir. 1965)	26
<i>United States v. Wunderlich</i> , 342 U.S. 98 (1951) 9, 10, 11, 35	
<i>Utah Constr. & Mining Co. v. United States</i> , 339 F. 2d 606 (Ct. Cl. 1964)	2, 3, 17, 21
 MISCELLANEOUS:	
Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1001 (1964)	13
30A AM. JUR., <i>Judgments</i> , §§ 328, 329 (1958)	28
Atomic Energy Commission Board of Contract Ap- peals, <i>Regulations</i> , 10 C.F.R., Part 3 (1965)	14
CCH GOVERNMENT CONTRACTS REPORTER, <i>Authority and Jurisdiction of Boards and Necessity for Contract and Disputes Clauses</i> , ¶¶ 23,055, 23,060	8

	Page
2 CCH GOVERNMENT CONTRACTS REPORTER, <i>Board of Contract Appeals</i> , ¶¶ 24,080, 24,085, 23,100, 23,120, 23,130	23, 24, 35
Clark, <i>Government-Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses</i> , 22 MIL. L. REV. 1 (1963)	36
6 Corbin, <i>Contracts</i> , §§ 1253, 1254 (1962)	33
Crowell & Anthony, <i>Practical Problems Facing Contractors Counsel as a Result of Fragmentation of Remedies</i> , 18 ADMIN. L. REV. 128 (1965)	22
Ellison, Address at the Court of Claims Centennial Banquet reported at 132 Ct. Cl. 1 (1955)	6, 22
Jaffe, <i>Judicial Control of Administrative Action</i> (1965)	13
Landis, <i>The Administrative Process</i> (1938)	13
Packers and Stockyards Act, 1921, As amended (7 U.S.C. § 181, et seq.)	15
Schultz, <i>Wunderlich Revisited, New Limits on Judicial Review of Administrative Determination of Government Contract Disputes</i> , 29 LAW AND CONTEMP. PROBS. 115 (1964)	11, 17
Shedd, <i>Administrative Authority to Settle Claims for Breach of Government Contracts</i> , 27 GEO. WASH. L. REV. 481 (1959)	6
Shedd, <i>Disputes and Appeals: The Armed Services Board of Contract Appeals</i> , 29 LAW & CONTEMP. PROBS. 39, 42-44 (1964)	8, 12
Speck, <i>Delays-Damages on Government Contracts; Constructive Conditions and Administrative Remedies</i> , 26 GEO. WASH. L. REV. 505 (1958)	37
Tucker Act, 28 U.S.C. § 1491	5
Welch, <i>Unliquidated Damage Claims for Breach of Contract</i> , Address before Govt. Contracts Committee, D. C. Bar Association, January 13, 1966 ...	6, 37
Wunderlich Act, 41 U.S.C. §§ 321, 322 (1964) ...	4, 10, 11, 30



IN THE
Supreme Court of the United States
OCTOBER TERM, 1965

No. 440

UNITED STATES OF AMERICA, *Petitioner*,
v.
UTAH CONSTRUCTION AND MINING Co., *Respondent*.

On Writ of Certiorari to the
United States Court of Claims

**BRIEF OF
SHIMATO CONSTRUCTION COMPANY, LTD.
AS AMICUS CURIAE**

Shimato Construction Company, Ltd. files this brief as *amicus curiae* pursuant to the written consent of the parties submitted herewith.

QUESTIONS PRESENTED

1. Is a factual finding made by a contract appeals board (or other designee of a department or agency head) in an arbitration proceeding under the "Dis-

putes" clause, contained in many Government contracts, binding on the contractor in a Tucker Act suit for breach of contract, reformation, rescission or injunction?

2. Does the "Disputes" clause require that all disputed questions of fact be decided by arbitration even though the relief sought, such as reformation, rescission, injunction, or damages for breach of contract, is not available from such arbitration board and is solely within the jurisdiction of the courts?

INTEREST OF AMICUS CURIAE

The issues which are to be reviewed in this case are identical to those involved in No. 224-62 in the Court of Claims in which Shimato Construction Company, Ltd., is plaintiff.

In No. 224-62 there is presently pending for decision by the Court of Claims the Government's request to review the Commissioner's Order dated December 20, 1965, allowing Shimato's request for a trial on its claim and the Government's four counterclaims. Following the decision of the court below in *Utah Constr. & Mining Co. v. United States*, 339 F.2d 606 (Ct. Cl. 1964), the Commissioner determined that Shimato's claim was for breach of contract and that Shimato accordingly is entitled to a trial notwithstanding that some of the facts pertinent to Shimato's claim had been found by the contract appeals board. Action by the Court of Claims on the Government's request for review has been stayed pending a decision by this Court in the instant case.

ARGUMENT

Introduction and Summary

This brief contains a very limited discussion of the facts of the *Utah* case. It believes that the controlling legal principle dispositive of both the *Utah* and *Shimato* cases is a pure question of law involving contract interpretation and the specific facts of cases are not relevant to its resolution. The *Utah* and *Shimato* facts are only illustrations of the context of the principle which is involved in *every* contract case brought under the Tucker Act in which there is a factual issue.

Shimato asserts that what is involved is simply a question of interpretation involving the arbitration (Disputes) clause of the contract. Since the decision of the court below accurately reflects forty years of the contemporaneous interpretation of the clause by the parties, it is believed that such contemporaneous interpretation is the best evidence of the parties' intent and should be accepted by the Court. Petitioner's position seeks to reject the longstanding and contemporaneous interpretation of the parties.

As discussed by the court below, since the advent of the "Disputes" clause, two distinct types of disputes arising from the performance of Government contracts have been recognized. One type of dispute involves the Government's breach of the contract, or other facts giving a contractor a right to reformation, rescission or injunction. Such disputes are resolved by suits brought by the contractor under the Tucker Act in the Court of Claims (28 U.S.C. § 1491 (1964)) or the federal district courts (28 U.S.C. § 1346 (1964)). Historically, the courts have held *nisi prius* trials to

resolve any fact issues. Traditionally, the department and agency heads and consequently their designated contract appeals boards (hereafter sometimes referred to as the board) have stated that they do not have authority under the "Disputes" clause to render relief of the type just indicated.

The second type of dispute is a one involving some specific contract provision, such as the "Changes" or "Changed Conditions" clauses; which gives the Government the right to grant relief to the contractor by the issuance of an equitable adjustment of the contract price and/or an extension of time for performance. In this second type of dispute all controverted issues of fact must be presented to the agency head or his representative whose decisions are final subject to judicial review under the standards of the Wunderlich Act, 41 U.S.C. §§ 321, 322 (1964).

It is inevitable that some of the facts in one type of dispute also will be involved in the other type of dispute. The basic question then becomes, "Who resolves such 'common facts'?" Petitioner would solve the "common facts" problem by having the agency determine them and make such determination binding on the courts in a suit based upon breach of contract, or seeking reformation, rescission, or injunction. Petitioner would go further and eliminate the distinction between the two types of disputes, and have the agency finally determine *all* facts in controversy.

To illustrate, in a suit for reformation, the contractor would first go to the agency to have all pertinent facts determined. The agency would give no relief. The contractor would then take the agency findings to court and ask the court for reformation. If such

procedure were adopted, the trial jurisdiction of the Court of Claims and the district courts under the Tucker Act for claims "founded upon . . . contract" (28 U.S.C. § 1491) would be completely eliminated.

Shimato asserts that the distinction between the two types of disputes represents the contemporaneous interpretation of the contract by the parties and should be upheld; further, that the distinction is necessary from a practical viewpoint, and that petitioner's position is unworkable.

Before discussing petitioner's specific arguments, Shimato discusses three points which are necessary to a proper understanding of the issues and of Shimato's argument.

PRELIMINARY POINTS

Petitioner's position on the two issues before the Court is flawed and rendered invalid by three fundamental errors in concept and approach, *viz*: (1) Petitioner fails to recognize that the issue is one of *contract interpretation*, *i.e.*, interpretation of the "Disputes" article of the contract; (2) Petitioner fails to recognize that the proceedings before the contract appeals boards are *arbitration* proceedings under a contract arbitration clause, not "administrative proceedings;" and (3) Petitioner misapprehends the issues and the decision of the Court in *United States v. Carlo Bianchi*, 373 U.S. 709 (1963).

While these points may appear elementary, it is submitted that petitioner's failures in these three areas are fatal to the position which it has taken in this Court. Each of these points are considered separately before the specific arguments made by the petitioner in its brief are considered.

1. THE ISSUE IS CONTRACT INTERPRETATION.

Fundamental to proper analysis of the issues is recognition that what is involved here is merely a question of contract interpretation. Petitioner seemingly recognizes this fact in framing the issues but in the course of its argument becomes completely distracted by extraneous considerations.

Claims "founded upon any express or implied contract" are enforceable against the United States solely by virtue of the waiver of sovereign immunity contained in the Tucker Act. This act, as amended, vests the United States Court of Claims with exclusive authority to determine such claims except those under \$10,000, where the United States district courts are given concurrent jurisdiction. Decisions by the Court of Claims and the district courts are final and binding on both parties, subject to appropriate review.¹

No statute gives to any Government official or agency authority to finally decide claims "founded upon . . . contract." *Cramp & Sons v. United States*, 216 U.S. 494, 500 (1915).² The Comptroller General has authority to settle breach of contract claims and such settlements are binding on the Government. 31 U.S.C. §§ 71, 74 (1964). But he has no authority

¹ See Address by *Newell Ellison* at the Court of Claims Centennial Banquet reported at 132 Ct. Cl. 1 (1955).

² See Address by *Mr. J. E. Welch*, Deputy General Counsel, General Accounting Office, reproduced in the appendix hereto. For an argument that government officials *should have* such authority see *Shedd, Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959).

to decide a breach of contract claim and have that decision binding on the claimant. *Climatic Rainwear Co. v. United States*, 115 Ct Cl 520, 88 F. Supp. 415 (1950).

Boards of contract appeals are established by order of the heads of governmental departments and agencies and authorized to render decisions on claims or disputes. Their authority is delegated from the head of the particular department or agency. For example, the Armed Services Board of Contract Appeals is established by the Secretaries of Defense, Army, Navy and Air Force to act as their representative. The administrative authority delegated to such boards by the secretaries varies among the departments and agencies. However, no head of a department or agency possesses *administrative* authority to decide finally any claim against a claimant and he cannot empower boards to do so. *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868).

On the other hand, heads of departments or agencies do possess *contractual* authority under the standard "Disputes" clause contained in many Government contracts to decide as "final and conclusive upon the parties . . . all disputes concerning questions of fact arising under this contract." The department or agency heads frequently delegate such *contractual* authority to a board of contract appeals.

The foregoing illustrates that contract appeals boards have two sources of authority to decide disputes, both delegated from the heads of the departments. One is administrative and is not binding on the contractor, and the other is contractual and is

binding on the contractor. This distinction is well established.³

The administrative, nonbinding, type of authority is described in the following oft-quoted statement by the Court of Claims in *McWilliams Dredging Company v. United States*, 118 Ct. Cl. 1, 16-17 (1950):

It is evident that the Secretary was authorizing the Board to act for him in the way that any owner would act if a contractor was dissatisfied with the way he was treated by the owner's representative in charge. He would listen to the contractor's story, and if he thought that his representative had been unfair, he would reverse him. He would do this, not because the contract gave him any authority to make a final decision which would bar the contractor from relief in the courts for breach of contract, but because it would be the natural and fair way for an owner to act. And just as the contractor in the supposed case would sue for breach of contract if his appeal to the owner did not give him satisfactory relief, so can the contractor with the Government, if he has not contracted away his right to do so.

The boards thus wear two hats, an administrative hat and a contractual hat. The critical distinction between the boards' two types of authority has not been

³ On the distinction between the two types of authority see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39, 42-44 (1964). Mr. Shedd is a vice-chairman of the Armed Services Board of Contract Appeals. An excellent summary and annotation is contained in 2 CCH GOVERNMENT CONTRACTS REPORTER, ¶¶ 23,055, 23,060 titled "Authority and Jurisdiction of Boards" and "Necessity for Contract and Disputes Clauses," respectively.

made by petitioner and its brief lumps the two together. The important point to be noted here is that the department or agency head theoretically could delegate to his board every administrative power in his possession and the board would not possess any authority to finally decide any claim "founded upon contract." Therefore, regulations or orders issued by the head of the department or agency enlarging or decreasing the board's administratively derived jurisdiction cannot affect the rights of a contractor. His rights are defined by, and only by, the "Disputes" clause of the contract. The scope of such clause is, therefore, determined by looking at the plain language of the clause and by applying accepted rules of contract interpretation to determine the intent of the parties, *i.e.*, the Atomic Energy Commission and Utah Construction and Mining Company.

It must be specifically noted that the Wunderlich Act (41 U.S.C. §§ 321, 322 (1964.)) does not give the boards any statutory authority. Petitioner misconstrues entirely that act by arguing that it somehow gives the boards *statutory* authority to render final decisions. Completely to the contrary, the Wunderlich Act is a *statutory limitation* on the *contractual* authority of the contract appeal boards to make final decisions as derived from the "Disputes" clause.

The Wunderlich Act was the outgrowth of two decisions by this Court, *United States v. Moorman*, 338 U.S. 457 (1950) and *United States v. Wunderlich*, 342 U.S. 98, 100 (1951). In *Moorman*, this Court reversed the holding of the Court of Claims that contract clauses providing for arbitral resolution by the Government of legal questions was void as against public

policy because it ousted the courts of jurisdiction. In *Wunderlich*, this Court, again reversing the Court of Claims, held that judicial review of decisions by contract appeals boards under the "Disputes" clause was limited solely to a determination of whether the decision was the result of fraud. The Court rejected the more lenient prevailing review standards applied by the Court of Claims, *i.e.*, whether the decision was arbitrary or capricious, the result of bad faith, or unsupported by substantial evidence.

Congress, dissatisfied with the great authority which these interpretations of the "Disputes" clause gave to the contract appeals boards, passed the Wunderlich Act in 1954. It provides:

Section 321. Limitations on pleading contract-provisions relating to finality; standards of review.

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

Section 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, § 2, 68 Stat. 81.

Section 1 of the Act *limits* the finality of a decision under the "Disputes" clause to determinations which were not only not fraudulent but also to those that were not arbitrary *or* capricious *or* so grossly erroneous as necessarily to imply bad faith *or* not supported by substantial evidence.

Section 2 of the Act prohibits the inclusion in a contract of any provision giving finality to board determinations of questions of law. Thus, the Wunderlich Act is a *statutory limitation* on the *contractually* derived authority of the contract appeals boards. The act does not give the *boards* any statutory authority to do anything. The Act gives the *courts* broader authority to review board decisions than they had previously possessed. The proviso of the Act, although couched in affirmative language, gave the board no authority it did not already have as a result of the "Disputes" clause. It was entitled an Act "To Permit Review of Decisions of Heads of Departments * * *." Its purpose was to limit finality of decisions granted by the "Disputes" clause as interpreted in *Moorman* and *Wunderlich*. *United States v. Carlo Bianchi*, 373 U.S. 709 (1963) at pp. 713-716. See also Schultz, *Wunderlich Revisited, New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 Law and Contemp. Probs. 115, 116-120 (1964).

2. PROCEEDINGS BEFORE A CONTRACT APPEALS BOARD ARE ARBITRAL NOT ADMINISTRATIVE.

The second misconception of petitioner also is fundamental. Underlying petitioner's position is its assumption that proceedings before a contract appeals board are "administrative proceedings," whereas, in fact, such proceedings are arbitration proceedings. The "Disputes" clause is nothing more or less than an arbitration clause whereby the parties agree that certain types of disputes will be arbitrated by the head of the Government department or agency.

The legality of such arbitral agreements was upheld as early as 1878, *e.g.*, *Kihlberg v. United States*, 97 U.S. (7 Otto) 398. In commenting on this case, Vice Chairman Shedd noted:

Kihlberg was nothing more than the application to a government contract that was then, and still is, a well-established principle of the law of private contracts, namely, that the parties to a contract can agree to be bound by the decision of a designated person with respect to a matter arising under the contract. . . . The approach of the courts is that it is simply a matter of giving effect to the intention of the parties as expressed in the contract.⁴

Since the "Disputes" clause is merely an arbitration agreement such as is used in private commercial contracts, petitioner's references to the "administrative process" are misplaced and misleading, thus casting in the same mold the functioning of the contract appeals boards and that of such agencies as the Interstate Commerce Commission, the Federal Trade Commis-

⁴ See Shedd, *supra* note 3, at 43-44.

sion, etc. The "administrative process" has been defined thus:

[It is not] simply an extension of executive power. Confused observers have sought to liken this development to a pervasive use of executive power. . . . In the grant to it of that full ambit of authority necessary for it to plan, to promote and to police, it presents an assemblage of rights normally exercisable by government as a whole.⁵

The foregoing definition indicates the very broad scope of the administrative process. It embraces delegated authority of the rights normally exercisable by Government as a whole "to plan, to promote and to police." Patently, the scope of the "Disputes" clause does not relate to the Governmental function "to plan, to promote, and to police." Nor does it include "an assemblage of rights normally exercisable by government as a whole." The "administrative process" basically is a development of political theory and is to be considered in the context of the proper role of Government in light of extant economic and social conditions.

In distinct contrast to the administrative process is the nature of arbitration. While the administrative process is wholly governmental in character, arbitration is wholly contractual and is non-governmental.⁶

⁵ Landis, *The Administrative Process*, at p. 15 (1938). This definition is adopted by Dean Louis L. Jaffe in *Judicial Control of Administrative Action*, p. 3 (1965).

⁶ The exemption of the Government's procurement efforts from the requirements of the Administrative Procedure Act recognizes this distinction. (60 Stat. 243 (1946), 5 U.S.C. § 1001 (1964)). The distinction between the activities of the Government acting in a procurement or proprietary capacity and its activities in a Governmental or sovereign capacity has long been recognized. *Cooke v. United States*, 91 U.S. 389, 398 (1875); *Perry v. United States*, 294 U.S. 330, 352 (1935).

While the administrative process takes in the whole of political, economic-socio development, arbitration is narrowly concerned with nothing more than what is contained in a particular clause. Nor is arbitration governmental in origin. It is a commercial practice adopted into government contracts. The fact that employees of the Government are arbitrators does not change the nature of the proceedings. The Government employed arbitrators are acting in a contractual capacity and not in a Governmental or sovereign capacity. The authority they exercise comes from the contract while the source of administrative authority proximately and ultimately is always the Constitution.

The fact that Government employees usually are the arbitrators has caused their actions frequently to be imprecisely called "administrative proceedings." The term "exhaustion of administrative remedies" has frequently been used, improperly and loosely. More precise terminology would describe such remedies (under the "Disputes" clause) as "contractual remedies." In its proper sense an "administrative remedy" is that provided by law or regulation. The remedies here involved are provided by neither but, rather, by the contract itself.

Illustrating the arbitral nature of the contract appeals boards proceedings is the recent practice of the Atomic Energy Commission to use a panel of three arbitrators, two of whom are not Government employees. The two non-Government members can determine the result by majority vote.⁷ Such procedure

⁷ The regulations governing the Atomic Energy Commission Board of Contract Appeals are set forth at 10 C.F.R., Part 3 (1965). See §§ 3.3 (b) and (c); 3.20.

highlights the impropriety of in any way equating or associating the proceedings under the "Disputes" clause with administrative law in its true Governmental sense.

It is seen therefore, that the respective roles of the Court of Claims and the contract appeals board involved in the instant case are not "collaborative instrumentalities of justice" in the sense that this Court has characterized the inter-relationship of courts and such administrative agencies as the Federal Communications Commission, the Interstate Commerce Commission and the Secretary of Agriculture discharging his decisional responsibilities under the Packers and Stockyards Act, 1921, as amended, (7 U.S.C. § 181 *et seq.*). *U.S. v. Morgan*, 313 U.S. 409, 422 (1941); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). As heretofore noted, the Court of Claims has jurisdiction, by statute, over one type of dispute and the contract appeals boards, only by agreement of the contracting parties, over other types. In both instances, the subject matter of the disputes arises out of the exercise of the proprietary as distinguished from the regulatory functioning of the Government.

3. Petitioner Misapprehends the Issue and Holding in United States v. Carlo Bianchi, 373 U.S. 709 (1963).

Petitioner relies primarily on the authority of the Court's decision in the *Bianchi* case which is cited at twelve different places in its brief. Each of its arguments rests on the authority of that case. It is submitted that throughout its arguments petitioner misapprehends the issue and the holding in the *Bianchi* case.

As presented to the Court, the *Bianchi* case was straightforward with clean-cut issues. The Corps of Engineers Contract and Appeals Board had denied the contractor's claim based on the "Changed Conditions" clause of the contract. In a subsequent action under the Tucker Act, the Court of Claims reversed the board's decision and entered judgment against the Government on the issue of liability. In arriving at its decision, the Court of Claims held a trial *de novo* admitting evidence that had not been presented at the board proceedings. This Court granted *certiorari*, to "resolve a conflict among the lower courts on the important question of the kind of judicial proceeding to be afforded in cases governed by the Wunderlich Act." The Court stated the issue:

This case involves the interpretation and application of the "Wunderlich Act," 68 Stat. 81, 41 U.S.C. §§ 321-322, an Act designed to permit judicial review of decisions made by federal departments and agencies under standard "disputes" clauses in government contracts. *The issue before us is whether, in a suit governed by this statute, the Court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues.* [*Id.* at 709-10.] (Emphasis supplied.)

The Court again stated the issue:

Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra*, p. 709, is whether the Court of Claims is limited to the administrative record

with respect to that controversy or is free to take new evidence. [*Id* at 714.]

The Court succinctly stated its holding:

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. [*Ibid.*]

The foregoing clearly discloses that the *Bianchi* decision held only that, in a dispute over which the contract appeals board had *contractual* authority to render a final decision, if it met the Wunderlich Act standards, judicial review of the agency decision is to be limited to the board record and additional evidence is not permitted. The *Bianchi* decision had nothing whatever to do with the situation involved in the instant case, *viz.*, "What forum should determine the facts pertinent to a breach of contract claim or a suit for reformation, rescission or injunction over which the contract appeals board has no contractual jurisdiction." In *Bianchi* the Court carefully distinguished that case from the present one:

Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract" [*Id.* at 714]

The care with which the Court in *Bianchi* defined the issue before it and specifically excluded the type of situation involved in the *Utah* and *Shimato* cases was noted by commentators long before these cases came to issue. See Schultz, *Wunderlich Revisited, New Limits*

on Judicial Review of Administrative Determination of Government Contract Disputes, 29 LAW AND CONTEMP. PROBS. 115, 120-123 (1964).

I. REFUTATION OF PETITIONER'S ARGUMENT ON THE FIRST ISSUE

Petitioner argues that a contractor who unsuccessfully presents a claim to a contract appeals board on a theory giving the board jurisdiction under one type of dispute (*i.e.*, under the "Disputes" clause) should not thereafter be permitted to change his theory to breach of contract for the purpose of obtaining a new trial before a court. We agree but assert that petitioner attempts to raise a false issue.

The two types of disputes are mutually exclusive and, accordingly, the problem posed by petitioner cannot and does not exist. Where a change in theory is advanced at the court level, the "problem" is resolved simply by proper analysis of the claim. If the claim (dispute) is of the type over which the contract appeals board had jurisdiction then by *definition* it cannot be a claim for breach of contract or reformation, rescission or injunction.

In such circumstances the contractor is bound by the board findings, subject to review under the Wunderlich Act standards. On the other hand, if the board did not have jurisdiction over the claim, even though the claim was presented to it, and the claim correctly analyzed is for breach of contract or reformation, rescission or injunction, the board's findings are a nullity and a trial should be held on all facts. There can be no valid switch of theories. Where such an attempt is made, one theory is right, one is wrong.

That proper analysis discloses the illusory nature of such "problem" is demonstrated by the instant case. Petitioner's brief at pages 19-21 alleges that respondent first brought to the board a claim based on changed conditions, and then *on the same set of facts* changed its theory to breach of contract. This is patently untrue. The opinion of the court below readily reveals that the changed conditions claim was based on the unexpected discovery of "float rock" and construction delays resulting therefrom. The breach of contract claim, on the other hand, was based upon the *delay of the contracting officer* in modifying the contract. These are two distinct and different delays, the latter type being a breach of contract under the authority cited by the court below.

1. Petitioner's main argument that "common facts" determined by a board must be binding on the Court of Claims in a breach of contract action is based on the contention that such result is required by the Court's decision in *United States v. Carlo Bianchi*. We have demonstrated under Point 3, *supra*, that the *Bianchi* decision related only to the type of judicial review to be afforded board determination of facts, where the dispute was properly before the board. The Court was careful to point out that "Respondent has not argued *in this Court* that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract . . ." 373 U.S. at 714, (emphasis supplied). By the quoted language, the Court was pointing out that, although the contractor in *Bianchi* had switched to a breach of contract theory before the Court of Claims, he did not urge such breach of contract theory before this Court. Accordingly, the issue of common facts was not considered or decided in *Bianchi*.

Petitioner cites various passages from the *Bianchi* opinion as supporting its present position. Such language must be read in the context of the issue then under discussion and, so read, does not support petitioner's position.

The Court stated that:

determination of the finality to be attached to a departmental decision on a question arising under a 'disputes' clause must rest solely on consideration of the record before the department
[*Ibid.*]

Later, the Court stated that the purpose of the Wunderlich Act

would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding. Moreover, the consequences of such a procedure would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense necessary to bring litigation to an end. [*Id.* at 717.]

Such language and holding is correct in the context of judicial review of a board decision when such decision involved a dispute properly before a board. But it has no application in the present case because the issue is whether a determination of a fact underlying a breach of contract or reformation claim was properly before the board and thus comes under the Wunderlich Act.

2. In this section of its brief petitioner argues further the same arguments made in the immediately preceding Section 1. Petitioner again pursues the false issue of the impropriety of first asserting a claim under the "Changed Conditions" clause and

then bringing a breach of contract suit on the same facts. As previously discussed, such are not the facts of the *Utah* case nor can such issue ever exist. Because, if the claim was properly before the contract appeals board under the "Changed Conditions" clause, by definition the identical claim cannot be one for breach of contract. The "Changed Conditions" clause makes an equitable adjustment under that clause the contractor's *exclusive* remedy for facts constituting a changed condition. The contractor has contracted away any previously existing right to sue on a breach theory on facts constituting a changed condition.

Similarly, under the "Changes" clause the contractor's only rights for a Government-ordered change to the work is an equitable adjustment provided by the "Changes" clause. The contractor has contracted away his previously existing right to sue for breach of contract on such facts. The contract appeals boards have contractual jurisdiction *only* through such clauses as the "Changed Conditions" and "Changes" clauses coupled with the "Disputes" clause. There are many other such clauses, a few of the more familiar are the "Suspension of Work" clause, the "Government-Furnished Property" clause and the "Negotiated Overhead Rate" clause.

Notwithstanding the foregoing, it does sometimes occur that a claim under a clause of the contract (for example, the "Changed Conditions" clause) will be based on *some* facts that are common to suit for breach of contract. The assertion of such claims are sometimes successive but frequently are concurrent. For example, a contractor may bring an action in the Court of Claims for breach of contract based upon Government-caused delays where the contract does not contain a "Suspension of Work" clause. At the same

time he may be processing before the agency's contract appeals board claims based on the "Negotiated Overhead Rate" clause. The two claims are distinctly different but arise from the same contract and probably will have some common facts.

Because the contract appeals procedure is more expeditious, there usually exists an appeals board determination of the "common facts" at the time the case comes up for trial before the court. The issue is whether the court is prevented from making its own determination of the common facts involved in the claim for breach of contract or for reformation. Or an action could be brought in the District Court for injunctive relief. Should the resolution of this "common fact" be only a footrace between the procedures of the court and the contract appeals board so that the first to issue a finding of fact binds the other?⁸ Can

⁸ This question is posed in the circumstance that the Court usually involved in Government contract litigation is the Court of Claims which was specifically established, equipped and manned for the trial and decision of such litigation. See *supra*, note 1. Examination of the docket entries in the Clerk's Office of the Court of Claims pertaining to the 34 contract cases argued on the merits in 1965, discloses that the parties requested or stipulated to 241 extensions of time. 180 of these or 75% were requested by the Government. The Government is in a position to intentionally or otherwise cause the arbitration proceedings to be completed prior to a court decision. In footnote 14 of its Brief in *United States v. Anthony Grace & Sons*, No. 439, October Term 1965, a companion case, petitioner states that disposition time in the Court of Claims for cases decided on the merits is 5½ years, citing Crowell & Anthony, *Practical Problems Facing Contractors Counsel as a Result of Fragmentation of Remedies*, 18 ADMIN. L. REV. 128, 139 (1965). The statistics given were post-Bianchi and were intended to demonstrate the slowdown in court procedures as a result of the confusion following the Bianchi decision. The article also indicates that in an average case a half year or more is taken by the Government to file its answer as a result of the failure of the interested agencies to forward litigation reports to the Department of Justice.

an appeals board by such prior determination reduce the jurisdiction of a court empowered by Article 3 of the Constitution?⁹

It is submitted that the answer to both questions should be in the negative. The jurisdiction of a constitutionally empowered court should not be reduced simply through the happenstance that in an arbitration proceeding such a common fact was decided. The question is one of contractual intent in agreeing to arbitration. Did the parties intend that determination of such common facts be binding on the courts? While arbitration clauses reducing the court's jurisdiction are not prohibited, the indignity of subjecting the courts to a footrace with appeals boards to retain its jurisdiction must be against public policy and may not be assumed to be the intent of the parties. The consistent contemporaneous interpretation of the parties from the inception has been that factual determinations by a contract appeals board are not binding in suits for breach of contract.

The Court of Claims and contract appeals boards have uniformly distinguished between claims based on breach of contract, reformation, and rescission, and those based upon a dispute arising under the contract. They have uniformly held that the "Disputes" clause did not contemplate claims of the former type and that such claims could be presented directly to the court. The cases hold that only claims "arising under the contract" were intended by the parties to be subject to the "Disputes" clause.¹⁰

⁹ *Glidden Co. v. Zdanoc*, 370 U.S. 530 (1961), *reh. den.*, 377 U.S. 934 (1963).

¹⁰ See 2 CCH GOVERNMENT CONTRACTS REPORTER, ¶ 23,120, entitled "Board of Contract Appeals" for a thorough discussion and extended annotation of this point.

The first clear expression of this principle is contained in *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629-30 (1937). In the ensuing twenty-nine years the rule has been uniformly followed and restated in literally hundreds of decisions by the Court of Claims and the contract appeals boards.¹¹ These cases hold that the parties' contractual agreement to be bound by the appeals board's factual determinations only related to specific disputes. The cases hold that the parties did not agree to be bound by appeals board determinations of facts involved in breach of contract claims, suits for reformation or rescission.

This intent of the parties should be given effect. The contemporaneous interpretation of the contract by one of the parties (i.e., the contract appeals boards) for almost thirty years should be controlling. The interpretation is reasonable, and to the extent, if any, that the "Disputes" clause is ambiguous it must be construed against the Government as its drafter. Examination of the annotations cited above reveals the cataclysmic change sought by petitioner.

There also are very practical reasons requiring adherence to the existing interpretation. To accept petitioner's position would produce endless wrangling as to whether a particular factual finding by an appeals board was necessary to its decision. Obviously, the

¹¹ Discussion and annotation of the Board's lack of authority to reform or rescind contracts are found in 2 CCH GOVERNMENT CONTRACTS REPORTER, ¶¶ 23,100, 24,085; Discussion and annotation of the Board's lack of authority to correct a mistake in bid, *id.*, ¶¶ 23,105, 24,085; Discussion and annotation of the Board's lack of authority to decide breach of contract claims, *id.*, ¶¶ 23,120, 24,080; Discussion and annotation of the Board's lack of authority to consider other types of claims against the Government, *id.*, ¶ 23,130.

board has some discretion as to how many or how few evidentiary findings it will make in determining an ultimate fact. Where they are "common facts", are evidentiary findings binding on the courts? May not an appeals board make so many evidentiary findings as to effectively remove all factual finding from the courts? What is the status of an evidentiary finding that the appeals board considered necessary in arriving at its ultimate factual finding? May the court disagree that the evidentiary finding was necessary and consider it unnecessary and gratuitous and therefore not binding on it because it was outside of the matter before the appeals board? Resolution of these problems would be far more time consuming than simply trying the issues *de novo* in the court.

What use may the court make of *de novo* evidence properly admitted as relating to one issue but also directly relating to a "common fact" found by a board? If such evidence discloses the board finding on a common fact to be incorrect must the court nevertheless accept the incorrect fact and base its decision upon it?

There is another serious procedural problem. Even under petitioner's interpretation, board findings on common facts would remain reviewable under the Wunderlich Act standards. Such review would be impractical. Frequently, the trier of facts arrives at a factual conclusion, not on the basis of a single item of evidence or certain lines of testimony, but rather "on the whole record." The plaintiff would then be entitled to have the court examine the whole appeals board record to determine whether the board's finding on some relatively unimportant "common fact" is supported by substantial evidence. Such problem always exists when credibility of witnesses is in issue,

which is almost every case where there is a conflict in testimony. It also exists when the allegation is made that a particular finding is highly improbable and unsupported when considered in the context of all the other evidence in the record. In such circumstances, the boards would have to send to the court the entire administrative record and the court would have to read it, including, perhaps, thousands of pages of transcript, merely to determine whether an evidentiary finding or a relatively minor "common fact" meets the Wunderlich Act requirements.

On pages 26 and 27 of its brief, petitioner argues "courts of appeals have also uniformly given administrative findings of fact properly rendered pursuant to the "Disputes" clause the finality accorded by that clause and the Wunderlich Act, *regardless of the conceptual nature of the judicial claim involved*. [Citing four cases.]" [Emphasis supplied.] Not one of the four cases stands for the proposition asserted. None involves common facts.

United States v. Peter Kiewit Sons Co., 345 F. 2d 879 (8th Cir. 1965). This case held that the claim being asserted was not a tort but arose under the contract and should have been presented to the contract appeals board. The court dismissed on the ground that it was without jurisdiction because the plaintiff had failed to exhaust its administrative remedy by presenting the case to the board. The court added as *dictum* that, even if the contractor had a choice of remedies (i.e., tort or contract), his presentment of the claim to the contracting officer constituted an election to proceed on the contract and a waiver of the tort. The entire opinion deals with "the conceptual nature

of the claim involved" and thus supports *Shimato's* position rather than petitioner's.

Allied Paint & Color Works v. United States, 309 F. 2d 133 (2d Cir. 1962). Because a legal issue was involved, the contractor here asserted that he was entitled to a trial *de novo* in court even though he had received a contract appeals board determination under the "Disputes" clause. The court denied a trial *de novo* on the ground that the underlying fact issues had been fully heard by the board. This is the same rule applied by the Court of Claims where the issue is a legal one. See discussion, *infra*, of *Morrison-Knudsen Co., Inc. v. United States*, 345 F. 2d 833 (Ct. Cl. 1965).

United States v. Hamden Co-op Creamery Co., 297 F. 2d 130, 133-135 (2d Cir. 1961). In this case the contractor wanted to offer "newly discovered evidence." This offer was rejected on the ground that the evidence was "too insignificant" and the case was decided on the basis of the board record. The court had first found that the fact issue had been properly before the board under the "Disputes" clause. (297 F. 2d at 133). This case is not inconsistent with the *Utah* case.

Silverman Bros., Inc. v. United States, 324 F. 2d 287, 289-290 (1st Cir. 1963). This case simply holds that the contract appeals board may determine under the "Disputes" clause the Government's excess costs of procurement where a contractor has been terminated for default. This has been the rule for so long that no citation of authority is necessary. This long-accepted principle has nothing to do with the issue presently before the Court.

In summary, it is Shimato's position that the courts and the parties have consistently construed the "Disputes" clause as distinguishing between disputes arising under the contract and suits for breach of contract, reformation, rescission and injunction. The "common fact" situation was not a problem until the Court in *Bianchi* held that judicial review of board findings was limited to the board record. Petitioner's suggested solution to this problem is wholly unreasonable and impractical, while Shimato's suggested solution is reasonable and practical. Shimato's solution gives full effect to the intent of the parties to vest the boards with final authority to resolve any dispute within their jurisdiction and for the courts to fully resolve any dispute within their jurisdiction. The "Disputes" clause is directed to the resolution of "disputes" and makes final the board's findings of fact in connection with resolution of that dispute. It was not intended to elevate an isolated finding to finality outside the framework of the particular dispute. The principle of collateral estoppel is applicable only to judicial determinations.¹² While the parties could have agreed to be "collaterally estopped" under the Disputes clause, it is apparent on the basis of the foregoing considerations that it was not their intent to do so.

II. REFUTATION OF PETITIONER'S ARGUMENT ON THE SECOND ISSUE

Petitioner also argues that the boards should determine, under the "Disputes" clause, *all* factual controversies arising from performance of the contract. Petitioner asks the Court to reject the existing distinction between claims arising "under the contract" and those

¹² See generally, 30A AM. JUR., *Judgments*, §§ 328, 329 (1958).

involving breach of contract, reformation, rescission, or injunction. Under petitioner's thesis, after the board makes a determination of the facts, it should grant relief where such relief is available under the contract (*i.e.*, pursuant to the "Changes," "Changed Conditions," etc. clauses), and where the board has no authority to grant relief (*i.e.*, breach of contract, reformation, rescission, injunction), board-found facts should be presented to the appropriate judicial forum and be binding on that forum. Petitioner admits that the consistent practice of the courts and boards has been otherwise and makes various arguments as to why this Court should now change the existing practice.

Petitioner's four arguments in support of its position are discussed separately below. Aside from the legal defects in petitioner's position, its utter impracticality is apparent. Since it is necessary that *someone* determine the factual issues in a suit for breach of contract or reformation, it is inherently unreasonable to have one forum (the board) determine the facts and then to have another forum (the court) decide the legal issues on the basis of the board-found facts. The more reasonable method is to have the forum with the authority to grant the relief requested also determine the facts upon which such relief is predicated. *Morrison-Knudsen Co., Inc. v. United States*, *supra*. Moreover, if the Government's position were adopted, it would produce endless wrangling both on the board level and in the courts as to what is fact, what is law, and who has authority to determine questions of mixed fact and law.

The more reasonable practice is the one presently prescribed in *Morrison-Knudsen Co., Inc. v. United*

States, supra, in which the Court of Claims avoided the very troublesome question of determining between fact and law. In that case, the contracting officer directed the performance of certain work believing it to be required by the contract under his interpretation of the specifications. The contractor performed the work under protest, contending it was extra work compensable under the "Changes" clause. The contractor's claim for payment of the extra work was denied by the board and the parties stipulated in the Court of Claims that the board had authority to award the relief requested, *i.e.*, payment for the extra work under the "Changes" article. The issue before the Court of Claims was who should decide the underlying facts where the basic dispute involves a legal question such as interpretation of the contract. The contractor contended that because the issue was legal and only the courts have jurisdiction to finally decide such legal issues (section 2 of the Wunderlich Act, 41 U.S.C. § 322 (1964)), the court should also have jurisdiction to decide the underlying facts.

After noting that it was frequently impossible to accurately distinguish between fact and law, the court came a very reasonable and practical result. It held that, where the contract appeals board has authority under the contract to grant complete relief for the claim, the board should determine all facts relating thereto even though the principal issue is legal. The court stated that upon judicial review of such a decision by a board, the court would not be bound by the legal conclusions of the board but would be bound by its factual findings, subject to review under Wunderlich Act standards. It is submitted that this result is reasonable and practical. Whenever the board has

au
aut
ther
und
ther
min
the

A
mer
in k
in, s
the
ulti
cour
to f
refe
ther
add
the
tive
the
cour
cont
fact
ably
wou

1.
pute
fact
to in
form
relat
a re

authority to grant complete relief, it should have the authority to make all factual findings in connection therewith. When the board does not have authority under the "Disputes" clause to grant complete relief, then it should have no authority to make factual determinations. It is submitted that this is the intent of the "Disputes" clause of the contract.

Another aspect of the impracticality of the Government's position is that the boards would have difficulty in knowing what facts a court would consider material in, say, a suit for reformation. To what extent should the board find evidentiary facts as distinguished from ultimate facts? What procedure is utilized where the court determines that the board findings are insufficient to form a basis for a conclusion—should the case be referred back to the board for further findings where there is evidence already in the record on which the additional findings by the Court may be based? Must the court in each instance review the entire administrative record to determine whether the facts found by the board meet the Wunderlich standards? May the court read the board record and be influenced by its contents, or must its decision be based solely upon the facts found by the board? These problems, and probably a great many additional unforeseen problems, would arise by adoption of petitioner's position.

1. Petitioner argues that the language of the "Disputes" clause ("all disputes concerning questions of fact arising under this contract") is sufficiently broad to include those facts relating to breach of contract, reformation, rescission and injunction, as well as facts relating to disputes for which the board can provide a remedy. This may be conceded as a matter of simple

grammatical construction. However, as pointed out above, the clause has never been construed that way either by the courts or by the parties, and, to the contrary, a distinction has always been maintained between claims "arising under the contract" and claims for breach of contract etc.

Petitioner argues against the application of such a distinction because allegedly there sometimes is difficulty in determining whether a claim is for a breach of contract or whether it arises under the contract. It cites only *Postashnick v. United States*, 123 Ct. Cl. 197 (1952) in support of this dubious proposition. Petitioner argues that in the *Potashnick* case the court awarded damages for breach of contract where the same relief was allegedly available under the "Changed Conditions" clause of the contract. An examination of the *Potashnick* case indicates that the basis for the court's decision was knowing misrepresentation which the court held was not compensable under the "Changed Conditions" clause. Whether this is a correct resolution of the issue is immaterial; the citation of a single case reflects the infrequency with which such alleged difficulty may occur.

The Government argues further, "A party denied administrative relief under a specific clause need only assert that the Government's conduct underlying his request for relief was unreasonable in order to transform a claim 'arising under' the contract into one for 'breach.'" (Petitioner's Brief, page 32.) Petitioner cites no authority for this statement which is baldly erroneous.

2. Petitioner argues that the distinction between the two types of claims frustrates the purpose of the "Dis-

putes" clause. (Petitioner's Brief, page 33.) The argument begs the question since the issue relates to the scope of the "Disputes" clause. Shimato asserts that its scope is limited to those claims "arising under the contract."

Petitioner argues that one of the purposes of the "Disputes" clause is to ensure that the contractor continues to perform pending resolution of the dispute. Shimato agrees that that is one of the purposes of the clause. Petitioner argues further that, if the Court of Claims' distinction between breach of contract claims and those "arising under the contract" is maintained, contractors will be stopping their work whenever they believe there has been a breach of contract by the Government and thus disrupt "important . . . defense or other essential Governmental purposes." (Petitioner's Brief, page 33.) The simple answer to this contention is that the distinction has always been maintained, and petitioner is unable to cite a single instance in which such work stoppage occurred. Moreover, it is elementary contract law that not every breach will entitle the innocent party to refuse to perform, but only such serious breaches as would constitute a repudiation of the contract, 6 *Corbin, Contracts* §§ 1253, 1254 (1962). Presumably such a serious breach could arise and there could be a work stoppage, but petitioner has cited no such instance.

At page 34 of its brief, petitioner argues "From the standpoint of providing an expeditious administrative process for settling factual disputes, we submit that it makes no difference whether a dispute is a 'breach claim' or an 'arising under' claim." Petitioner's reference to "administrative process" once again reflects its confusion between arbitration proceedings and the

Governmental administrative process discussed under Shimato's Point 2, *supra*. Moreover, petitioner's argument contains a logical fallacy. There is no inherent value in expeditious settlement of factual disputes *per se* unless the board *also* has the authority to grant the relief requested. For example, even under petitioner's theory the final resolution of a breach of contract claim will not occur until the *court* renders decision regardless of who makes the factual determinations.

3. Petitioner here repeats its argument that the Court of Claims' distinction between the two types of claims offers contractors dissatisfied with the board's results an opportunity to relitigate factual disputes by alleging in court that the claim is for breach of contract. As discussed above, this is a illusory problem because by definition the two types of claims are mutually exclusive. As stated in the *Morrison-Knudsen* case, the Court of Claims will accept as binding upon it all factual determinations made by a board where the board has authority under the contract to grant complete relief. It is only with respect to the residue of claims and disputes that the Court of Claims will take original jurisdiction and hold a trial for determination of facts.

It is submitted that the *Saddler* case relied upon by petitioner is entirely consistent with the *Morrison-Knudsen* case. In *Saddler*, the Court of Claims held that the changes authorized under the "Changes" clause of the contract were limited to those within the general scope of the contract and any change outside the scope of the contract constituted a breach of contract. In other words, under a contract for the construction of a garage, the Government could not, pur-

suant to the "Changes" article, direct the construction of a 50-story building.

At page 38, petitioner again demonstrates its misapprehension of the nature of the Wunderlich Act. Petitioner states: "One of the basic purposes of the Wunderlich Act in providing for finality of factual findings under the Disputes clause"

As discussed in Shimato's Point 2, *supra*, the basic purpose of the Wunderlich Act was not to provide "finality of factual findings under the Disputes clause." Such factual findings already were final as that clause was interpreted in the *Wunderlich* case, absent fraud. Contrary to the Government's understanding, the purpose of the Wunderlich Act was to *limit* finality except where the findings met the standards set forth therein.

4. Petitioner's fourth argument seems to concede that the breach of contract (reformation and rescission) distinction has always been made but asks that these hundreds of cases be reexamined in light of *Bianchi* and that the rule be changed. Throughout its brief petitioner refers only to breach of contract as the division between court and board jurisdiction. This is not correct, because, as previously noted, the courts also have jurisdiction over claims for reformation, rescission and injunction. Even if the trend is toward reducing pure breach of contract claims by the addition of relief clauses to the contract, it may be stated that no board has ever exercised or suggested that it should exercise jurisdiction over requests for reformation, rescission or injunction.¹³

¹³ See *supra* note 11.

(a) Court of Claims Cases.

Petitioner argues that the rationale of the pre-*Bianchi* cases is either invalid or suspect. But even if these contentions were correct, and they are not, it still remains that those cases reflect what was in the minds of the contracting parties at the time the "Disputes" clause was first initiated. If, thirty years later, it were demonstrated that their intent was based on some legal misapprehension it would not change the intent. Moreover, once the Court of Claims had first clearly stated that intent (*Phoenix Bridge Co. v. United States, supra*) all further use of the "Disputes clause" was in contemplation of the intent as stated in the *Phoenix Bridge* case. Regardless of the correctness of that case, by using the "Disputes" clause in their subsequent contracts, the parties accepted the existing judicial interpretation.

(b) Administrative Practice.

Petitioner admits that the boards have refused to take jurisdiction in "pure" claims for breach of contract. It argues that there are three reasons why the boards have refused to accept such jurisdiction and that each of such reasons is invalid.

Petitioner first asserts that this Court has held that Government-caused delays are not actionable. Even a casual reading of the cases cited discloses that they do not so hold. The rule is that the Government is responsible for its delays in the same manner as any private party. See Clark, *Government-Caused Delays in the Performance of Federal Contracts: The Impact of the Contract Clauses*, 22 *Mil. L. Rev.* 1 (1963); Speck, *Delays-Damages in Government Con-*

tracts; Constructive Conditions and Administrative Remedies, 26 GEO. WASH. L. REV. 505 (1958).

Second and third, petitioner argues, the boards have declined jurisdiction of breach claims only because they are attempting to comply with decisions of the Court of Claims thought to preclude such relief. Petitioner cites no board cases or other authority for this statement. That the administrative officers of the Government independently believed themselves to be *without* such authority is demonstrated by the address of the Deputy General Counsel of the General Accounting Office, reproduced in the Appendix hereto.

Petitioner argues strenuously that the revised charters of some of the boards *now* give them jurisdiction over breach claims. At page 47, petitioner cites a Memorandum from the Secretary of War purporting to give the board such authority. In so arguing, petitioner again misses the basic distinction, discussed in Shimato's Point 2, *supra*, between the two hats worn by the boards, one administrative and not binding on contractors and one contractual which is binding on contractors. Unilateral changes or increases in the boards' jurisdiction cannot affect the contractual agreement between the parties. Moreover, the department or agency heads cannot create such authority *sui generis* and cannot delegate to their boards authority they do not themselves possess. See Appendix hereto.

5. Petitioner here presents as a separate point, its argument, already made two or three times, that Government officers do have authority to pay breach claims. These contentions are refuted in the Appendix hereto. But even if such Government officers do have authority to pay breach claims their authority to do so is admin-

istrative and not contractual. Since it is undisputed by petitioner that the parties have always *believed* that Government officers do not have such authority, their use of the "Disputes" clause was in contemplation of such belief and they therefore did not intend that the head of a department or agency would have under the "Disputes" clause contractual jurisdiction over such claims.

CONCLUSION

The court below held that the intent of the "Disputes" clause is that the courts and boards each have jurisdiction over the facts underlying the type of relief within their respective jurisdictions. The court below has applied a similar rule in *Morrison-Knudsen Co., Inc. v. United States, supra*, where it held that the boards should finally determine those facts underlying what is basically a legal issue *if* the board can grant the relief requested, otherwise the court should determine the facts and the law.

Shimato asserts that the foregoing represents a very reasonable and practical solution to the entire problem of the division of jurisdiction between the courts and boards on contract disputes. Moreover, it is consistent with the long-established contractual intent of the parties. On the other hand, petitioner asks the court to cause a revolutionary change without offsetting benefits to its many inherent impracticalities. It is

submitted that the intent of the parties should be controlling and the decision below upheld.

Respectfully submitted,

ASHLEY SELLERS

GILBERT A. CUNEO

DAVID V. ANTHONY
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D. C. 20006
*Attorneys for Shimato
Construction Company, Ltd.*



ХИМИКА

APPENDIX

Address by J. E. Welch, Deputy General Counsel, General Accounting Office, before Government Contracts Committee, D. C. Bar Association, January 13, 1966, on Unliquidated Damage Claims for Breach of Contract.

Our subject today, as announced by your chairman, is "Administrative Authority to Settle Unliquidated Damage Claims for Breach of Government Contract." My purpose, as I understand it, is to tell you what we in GAO consider the rule to be, explain the apparent basis for the rule and give you the reasons why GAO thinks it is a necessary and proper rule.

Actually the general rule, as GAO sees and applies it, is that the contracting agencies do not have authority to settle and pay such claims.

There is no specific statutory prohibition against administrative settlement of unliquidated damage claims for breach of contract but the rule undoubtedly has its origin in the old revised statute R.S. 3678 (31 U.S.C. 628) which reads:

"Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

Applying this statute the theory is, of course, that contract appropriations are made to pay for performance of contracts not for failure to perform.

While no laws exist which specifically prohibit administrative settlement of unliquidated damages for breach of contract, the rule against such settlement has been asserted and followed many times over the years in decisions rendered by the Attorney General, the Courts and the Comptroller General. The latter official, as you know, heads the General Accounting Office.

In 1832 Attorney General Taney held (Atty. Gen. Op., ed. 1841, p. 882) that it was not within the power of the executive branch of the Government to liquidate and pay damages sustained by a contractor whose contract had been breached by Government's refusal to accept delivery according to the contract.

In 1844 the then Attorney General held that accounting officers of the Treasury have no authority to adjust the claims of contractors for damages, without the special authority of an act of Congress. 4 Op. Atty. Gen. 327.

In an Attorney General opinion decided in 1922 the rule in the form most frequently stated was set forth. That case involved a submission by the Secretary of War asking whether there was a contract, whether there was legal authority to make such a contract, whether such contract had been breached and if so what damages were owing. The Attorney General replied that it was unnecessary to express an opinion as to the legal effect of the transaction because, he said, "It is well established that the head of an executive department is without authority to settle a claim for unliquidated damages." 33 Op. Atty. Gen. 354.

Other Attorney General opinions have so held. See, for example, 4 Op. Atty. Gen. 627; *id.* 516 and 14 *id.* 24.

This unliquidated damages rule has been stated in numerous Court of Claims decisions dating at least from 1866 to the present time. See, for example, *Carmick v. United States*, 2 Ct. Cl. 126, 140 (1866); *Powers v. United States*, 18 Ct. Cl. 263 (1883); *McClure v. United States*, 19 Ct. Cl. 18, 28 (1883); *Dennis v. United States*, 20 Ct. Cl. 119, 120-121 (1885); *Brannen v. United States*, 20 Ct. Cl. 219, 224 (1885); *Miller, Inc. v. United States*, 111 Ct. Cl. 252 (1948); *Langevain v. United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Company v. United States*, 101 Ct. Cl. 148 (1944). The two most recent Court of Claims decisions on the point are *Utah Construction and Mining Co.*

v. *United States*, Court of Claims No. 3-61, December 11, 1964; and *Brock & Blevins Co., Inc. v. United States*, Court of Claims No. 292-59, April 16, 1965. I will discuss both of these cases later on.

Even the Supreme Court of the United States has subscribed to and applied the rule. In *Cramp v. United States*, 216 U.S. 494, 500 (1910) the Supreme Court expressly stated:

"It is well understood that executives officers are not authorized to entertain and settle claims for unliquidated damages."

Also, see *Cramp v. United States*, 239 U.S. 221, 227 (1915).

The Comptroller General has rendered a number of decisions since the GAO was established in 1921 taking the same position. For example, see 18 Comp. Gen. 199 (1938); 18 Comp. Gen. 261 (1938); 19 Comp. Gen. 933 (1940); 32 Comp. Gen. 333 (1953); 26 Comp. Gen. 647, 649 (1947); and 44 Comp. Gen. 353 (December 1964).

In the last cited case the Secretary of the Interior requested a decision from the Comptroller General as to whether a claim of a construction contractor for additional costs incurred due to delay by the Government in furnishing borrow material properly could be allowed under the changes clause of the contract. The Comptroller General pointed out that the changes article relates to changes in drawings, designs and specifications not to a claim for additional costs resulting from delays in performing the unchanged work attributable to the Government. He then held that the claim was one for unliquidated damages for breach of contract and that neither the Secretary of the Interior nor the contracting officer had authority to settle the claim under the disputes clause of the contract or otherwise. In his decision the Comptroller General quoted extensively from the decision of the Court

of Claims in the *Utah Construction and Mining Co.* case to which I have already referred. In that case the court made the following pertinent statements:

"Where the dispute 'arises under the contract' the contracting officer and the head of the department have authority to decide questions of fact and the contract makes their decision thereon final and conclusive; but where the dispute involves an alleged breach of the contract, and the contractor seeks unliquidated damages therefor, neither the contracting officer nor the head of the department has jurisdiction to decide the dispute. *Miller, Inc. v. United States*, 111 Ct. Cl. 252, 77 F. Supp. 209 (1948); *Langevin v. United States*, 100 Ct. Cl. 15 (1943); *B-W Construction Co. v. United States*, 101 Ct. Cl. 748 (1944); reversed in part on other grounds, *United States v. Beuttas, et al.*, 324 U.S. 768 (1944) If they undertake to do so—which they rarely do—neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882); *Coyle v. Skirvin*, 124 F. 2d 934, 937 (10th Cir. 1942), and cases there cited. See also *Petition of Taffel*, 49 F. Supp. 109, 111 (S.D.N.Y. 1941).

"Defendant contends that since the contract gives to the contracting officer and the head of the department authority to make findings of fact concerning *all* disputes, they have authority to make findings concerning a dispute over whether the contract had been breached. This contention cannot be sustained. The contract plainly limits their authority to make such findings to 'disputes concerning questions of fact arising under this contract.' This means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation of the contract."

In conclusion the court held that, since the case involved an action for breach of contract, the parties were not

bound by the decision of the board of contract appeals; that they therefore could introduce evidence *de novo* concerning any unreasonable delay that may have been occasioned thereby. The Supreme Court has granted *certiorari* in this case. Perhaps that Court will clear up this whole problem area.

It has been repeatedly argued that notwithstanding the rule as acknowledged in the above decisions the Court of Claims has held in *Cannon v. United States*, 162 Ct. Cl. (1963), with subsequent reference thereto in *Brock v. United States*, Court of Claims No. 292-59, April 16, 1965, that a contracting officer and the procuring agency have inherent authority outside the contract provisions to settle, by mutual agreement with the contractor, claims for unliquidated damages for breach of contract arising from Government delay. It should be noted that in both of those cases the contractor's claim was disposed of by the court on the basis of complete accord and satisfaction which the court said barred the suits. In the *Cannon* case any damages were considered to have been included in an equitable adjustment made pursuant to the contract's "Suspension of Work" clause. In the *Brock* case the court stated that "The claim for damages was necessarily considered by both parties as an integral part of the claim for extra work" for which settlement had been made in the form of a modification to the contract under its "Changes" clause. The court thus obviously considered that such settlements had their foundation in contractual provisions and that therefore they did not seem to be clearly objectionable as being based on an application of other than established legal principles.

At this point I should mention that the Supreme Court in *United States v. Corliss Steam-Engine Company*, 91 U.S. 321 (1875), held, in effect, that the head of an agency may terminate a contract he was authorized to make whenever the public interest may so require and may settle

with the contractor for the partial performance of the contract. In a decision by our Office dated February 5, 1965, 44 Comp. Gen. 466, to the Postmaster General we pointed out that we have long recognized the *Corliss* holding but expressed the view that there is a clear distinction between claims for damages resulting from the culpable failure of the Government to carry out specific obligations under its contracts and claims for compensation for work, etc., performed under a valid and subsisting contract which has been terminated in the public interest. In view of such distinction, and since we do not regard the *Corliss* case as contemplating or encompassing breaches of contracts other than the type considered therein, we do not conclude that it may reasonably serve as controlling authority for the administrative negotiation of a mutually satisfactory settlement of claims for unliquidated delay damages. We feel such a conclusion would be in disregard of subsequent expressions of well recognized limitations concerning administrative settlement of unliquidated damages claims, including the Supreme Court's later holding in the *Cramp* cases, which I have already discussed. Remember the *Corliss* case was decided in 1875 but you will recall, as I have pointed out, the Supreme Court in the 1910 *Cramp* case said:

"It is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages."

In any event, it seems obvious that the Court of Claims did not consider it was departing from the general rule in reaching its conclusion in the *Brock* case. This is so because in the decision the court specifically stated that "The question arises as to how an equitable adjustment may include damages for breach, when only this court has jurisdiction to entertain an action for breach." To my knowledge, that is the Court of Claims' latest pronouncement on the subject—"only this court has jurisdiction to entertain an action for breach."

After pointing out that I now must tell you that GAO considers it has jurisdiction over claims for breach of contract. The position of the Office in that regard is based upon the comprehensive provisions of section 305 of the Budget and Accounting Act, 1921 (31 U.S.C. 71) that:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Consequently, in concluding his decision in the Department of the Interior case the Comptroller General advised the Secretary that GAO will settle breach of contract claims where there is no doubt involving liability of the Government and the amount of damages can be determined with reasonable certainty, and that therefore he would be willing to consider a voucher to cover the damage claim of the contractor in an amount administratively determined to be due if that amount were acceptable to the contractor in full and final settlement of its claims.

I would like now to discuss the practical reasons why GAO feels the rule against administrative settlement of breach of contract claims is necessary and proper to adequately protect the Government's interest.

In the first place there generally exists considerable if not extreme doubt as to whether there was an actionable breach, that is, whether the Government is legally liable for breach of contract. This can be and generally is an unusually difficult question. Among other things the answer to that question frequently turns on the further question of whether the Government's delay was reasonable under the circumstances. After the question of breach has been decided in the affirmative another very doubtful question must be decided. That is the amount of damages properly payable to the contractor. In other words then

claims for unliquidated damages for breach of contract generally constitute one of the most doubtful and difficult classes of claims that can be presented to the Government or to the courts for that matter. The duty of the executive agencies and the accounting officers of the Government with respect to claims as to the validity of which there is serious doubt was spelled out long ago by the Court of Claims in *Longwill v. United States*, 17 Ct. Cl. 288 (1881) and *Charles v. United States*, 19 Ct. Cl. 316 (1884). The court in the latter case stated:

“When, in the course of the examination of accounts in the Departments, suspicions are aroused or doubts are entertained as to the validity of the demands of claimants, the parties may be sent to this court to prove their cases under the rules and forms of law, upon legal and competent evidence, or their demands may be rejected altogether, leaving the claimants to prosecute them here upon their own voluntary petitions, if they so desire. That is the main protection which the accounting officers can secure for themselves and for the government in the case of claims of doubtful validity in fact or in law. * * *”

The lack of an adequate procedure for administrative settlement of breach of contract claims is another practical reason why GAO would be reluctant to agree to any change in the rule against administrative settlement. If the rule did not exist under what procedure would such claims be settled administratively—necessarily under the disputes clause procedure. However, it must be realized that that procedure offers no protection to the Government against erroneous and adverse decisions by administrative officials. It is a one way street—it serves as a protection of the rights of contractors only. Consider the language of the standard disputes clause. First, it provides that the decision of the contracting officer shall be final and conclusive unless appealed by the contractor to the head of the agency within 30 days. Note that the clause says “appealed by the contractor” not the Govern-

ment. It thus can be reasonably argued that even if a contracting officer's decision against the Government on a question coming under the disputes clause is erroneous it is final and conclusive without any right of appeal on behalf of the Government. Secondly, the clause provides that the decision of the head of the agency or his duly authorized representative on the appeal shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith or not supported by substantial evidence.

Incidentally, I can tell you from my own first-hand information that the language of the clause attempting to limit the appeal to a "court of competent jurisdiction" is intentionally designed to preclude any review of board decisions by GAO. Pursuant to its general settlement authority however our Office has, although infrequently, questioned disputes clause decisions as not meeting the standards set forth in the Wunderlich Act, 41 U.S.C. 321. That act as you know provides in effect that board decisions under contract dispute clauses on disputed questions of fact shall be final and conclusive unless fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith, or not supported by substantial evidence. GAO thinks that the Congress when it was considering the Wunderlich Act recognized that the GAO should have the authority to exercise necessary and desirable review functions in this area. In addition to the fact that the act does not limit review to a court of competent jurisdiction as the standard disputes clause attempts to do, the House Report (No. 1380) on the bill which ultimately became the law contains this statement:

"The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the juris-

diction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended [with respect to review of administrative decisions] should not be construed as taking away any of the jurisdiction of that office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.' Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision."

But getting back to the appeal procedure generally—many board decisions adverse to contractors have been and are continually being appealed by the contractors to the Court of Claims. I know of no instance though where a board decision against the Government has ever been so appealed except in the very few cases which have been forced into the court by action of GAO. The contracting agencies have no procedure for filing appeals, or if they do they do not exercise it for the obvious reason that the boards are representatives of the heads of the agencies. Consequently then, in addition to the fact that the Government has no right of appeal whatever from contracting officers' disputes clause decisions, as a practical matter there is presently no procedure in existence for appeal to the courts by the Government on matters decided by the boards under disputes clauses.

I want to point out also that the fact that the boards represent the heads of their respective agencies for administrative purposes furnishes no justifiable basis for the

argument that board decisions are the Government's decisions and therefore should not be appealable on behalf of the Government. This is the argument most generally advanced, I believe, but it is a fallacious argument that does not face up to the realities of the situation. It is a matter of record that contracting officers frequently render erroneous decisions against contractors and that on occasion at least the various boards also erroneously decide against contractors. This is evidenced by the many successful contractor appeals made to the boards and the courts. Certainly there is no reasonable basis to assume that contracting officers and boards do not render an equal number of erroneous decisions against the Government. Thus the argument that the Government is not in need of the protection afforded by judicial review because such decisions are made by Government officials overlooks the fact that such officials can err in favor of contractors as well as the Government. The argument also ignores the fact that contract disputes hearings are adversary proceedings in which the hearing tribunal should be—and no doubt prides itself on being—impartial and independent. To view the appeals boards purely as agents of the Government in connection with their decision making function would reduce them to a subservient status with the implication that they are incapable of exercising independent, fair and impartial judgment. The fact is the contract appeal boards have in effect become institutionalized and have a long and honorable history of fair, impartial and independent adjudication of disputes brought before them by contractors. However, like any tribunal, judicial or administrative, they can commit errors of law or fact in making their decisions and no responsible critic today would contend that in the hearing of a case they represent the department's or agency's interest. As I understand it, in the proceedings before the boards the Government's interest, the same as the contractor's, is generally represented by a trial attorney. For example, the rules

governing the procedures before the ASBCA provide that Government counsel designated by the various departments, agencies, directorates and bureaus cognizant of disputes brought before the Board "may in accordance with their authority represent the interests of the Government before the Board." Under the rules these Government attorneys may move for reconsideration by the Board but unlike the contractor's attorneys, the Government's attorneys are precluded from appealing by the lack of an adequate appeal procedure.

So long as this situation prevails, I think the GAO can be expected to favor a continuation of the present rule which precludes contracting officers and appeal boards from taking jurisdiction over unliquidated damage claims for breach of contract. Of course I think too that, if the rule is changed by authoritative court decisions, GAO will undoubtedly fall in line and follow the precedents thus established.





SUPREME COURT OF THE UNITED STATES

No. 440.—OCTOBER TERM, 1965.

United States, Petitioner,	}	On Writ of Certiorari to the United States Court of Claims.
v.		
Utah Construction and Mining Co.		

[June 6, 1966.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The typical construction contract between the Government and a private contractor provides for an equitable adjustment of the contract price or an appropriate extension of time, or both, if the government orders permitted changes in the work or if the contractor encounters changed conditions differing materially from those ordinarily anticipated. Likewise, it is provided that the contract shall not be terminated nor the contractor charged with liquidated damages if he is delayed in completing the work by unforeseeable conditions beyond his control, including acts of the Government. See Armed Services Procurement Regulations (hereinafter ASPR), 32 CFR §§ 7.602-3 to 7.602-5; Atomic Energy Commission Procurement Regulations (hereinafter AECPR), 41 CFR § 9-7.5005-2.¹ Article 15 provides that "all disputes con-

¹ In the contract presently before us these clauses read as follows:
"Article 3. *Changes*.—

"The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however*, That the contracting officer, if he determines that the facts justify such action, may receive and

2 UNITED STATES v. UTAH CONSTRUCTION.

cerning questions of fact arising under this contract" shall be decided by the contracting officer subject to written appeal to the head of the department, "whose deci-

consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

"Article 4. *Changed conditions.*—

"Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

"Article 9. *Delays—Damages.*—

"If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor

UNITED STATES v. UTAH CONSTRUCTION. 3

sion shall be final and conclusive upon the parties thereto." ASPR, 32 CFR § 7.602-6; AECPR, 41 CFR § 9.7.5004-3.² Appeals from the decision of the contract-

shall continue the work, in which event it will be impossible to determine the actual damages for the delay and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, if the contractor shall within 10 days from the beginning of any such delay (unless the contracting officer shall grant a further period of time prior to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

² The disputes clause in the instant contract reads:

"Article 15. *Disputes.*—

"Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

4 UNITED STATES v. UTAH CONSTRUCTION.

ing officer are characteristically heard by a board or committee designated by the head of the contracting department or agency. Should the contractor be dissatisfied with the administrative decision and bring a Tucker Act suit for breach of contract in the Court of Claims or the District Court, 28 U. S. C. § 1346 (a)(2) (1964 ed.), the finality accorded administrative fact finding by the disputes clause is limited by the provisions of the Wunderlich Act of 1954 which directs that such decisions "shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."³ With respect to this statutory provision we held in *United States v. Carlo Bianchi & Co.*, 373 U. S. 709, that where the evidentiary basis for the administrative decision is challenged in a breach of contract suit, Congress did not intend a *de novo* determination of the facts by the court, which must confine its review to the administrative record made at the time of the administrative appeal.

The issues in this case involve the coverage of the disputes clause and a recurring problem concerning the

³ "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

"Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board." 68 Stat. 81, 41 U. S. C. §§ 321-322 (1964 ed.).

application of *Bianchi* to certain findings made during the administrative process. We granted certiorari because of the importance of these questions in the administration of government contracts. 382 U. S. 900.

I.

The contractor, Utah Construction & Mining Company, executed a contract in March of 1953 to build a facility for the Atomic Energy Commission. After completing the project in January 1955, it filed with the contracting officer a "Pier Drilling" claim, which asked for an adjustment in the contract price and an extension of time under Article 4, the "changed conditions" clause. The contractor asserted it had encountered float rock in the course of excavating and drilling which, among other things, had increased its costs and delayed the work. Contrary to the decision of the contracting officer, the Advisory Board of Contract Appeals found the float rock to be a changed condition within the meaning of Article 4. But the Board nevertheless denied the request for a time extension and for delay damages. It found that the increased costs had been incurred by a subcontractor rather than the contractor and that the delay experienced by the contractor was not caused by the float rock but by a dispute over the quality of concrete aggregate furnished by the Government, a dispute not then before the Board for adjudication.

Another claim filed by the contractor, its "Shield Window" claim, asserted the existence of changed conditions calling for relief under Article 4 by reason of inadequate specifications and drawings furnished by the Government. Additional compensation and additional time were demanded. The Board found there was no changed condition within Article 4 and denied additional compensation. However, it found the delay involved to be the result of difficulties inherent in a new field of construc-

6 UNITED STATES v. UTAH CONSTRUCTION.

tion rather than the fault of either party, and it therefore authorized a time extension under Article 9.

In the contractor's subsequent suit for breach of contract, the Court of Claims held both the Pier Drilling claim and the Shield Window claim to be claims for delay damages alleging a breach of contract by reason of the Government's unreasonable delay. In its view, such breach of contract claims were not within the disputes clause and the administrative findings regarding the responsibility for the delays were subject to *de novo* determination in the Court of Claims. The disputes clause limited the authority of the Board to "disputes concerning questions of fact arising under this contract." That meant "a dispute over the rights of the parties given by the contract; it [did] not mean a dispute over a violation of the contract." *Utah Constr. & Mining Co. v. United States*, 339 F. 2d 606, 609-610 (Ct. Cl. 1964). Because the Advisory Board of Contract Appeals was clearly authorized to determine the cause of the delay in granting or denying the request for an extension of time under Article 4, the dissenting judge thought the findings were reviewable only on the administrative record and therefore objected to the *de novo* trial ordered by the majority. 339 F. 2d, at 615 (Davis, J.).

The meaning of the Court of Claims' distinction between disputes over rights given by the contract and disputes over a violation of the contract has been clarified in a subsequent decision holding that to the extent complete relief is available under a specific contract adjustment provision, such as the changes or changed conditions clauses, the controversy falls within the disputes clause and cannot be tried *de novo* in a suit for breach of contract. *Morrison-Knudsen Co. v. United States*, 345 F. 2d 833, 837 (Ct. Cl. 1965). With respect to relief available under the contract, therefore, the contractor must exhaust his administrative remedies and the

findings and determination of the Board would be subject to review under the Wunderlich Act standards, as applied in *Bianchi*. But the Court of Claims has also ruled that when only partial relief is available under the contract—*e. g.*, an extension of time under Article 4—the remedies under the contract are not exclusive and the contractor may secure damages in breach of contract if the Government's conduct has been unreasonable. See *Fuller v. United States*, 108 Ct. Cl. 70, 90-102, 69 F. Supp. 409 (1947); *Kehm Corp. v. United States*, 119 Ct. Cl. 454, 465-473, 93 F. Supp. 620 (1950). The issue raised by the decision of the Court of Claims respecting the Pier Drilling and Shield Window claims is therefore whether factual issues that have once been properly determined administratively may be retried *de novo* in subsequent breach of contract actions for relief that is unavailable under the contract.

The other issue of significance in this case is raised by a third claim filed by the contractor and involves the matter referred to by the Advisory Board of Contract Appeals in disposing of the contractor's Pier Drilling claim. The contractor, as it was permitted to do under the contract, elected to purchase concrete aggregate from the government stockpile, discovering very shortly that the aggregate was dirty and its poor quality the cause of understrength concrete. The Government suspended the work for a time, directed temporary corrective procedures and itself undertook more permanent remedial measures. After completing the contract, the contractor claimed extra compensation based on the poor condition of the aggregate, which was alleged to be a changed condition under Article 4. The contracting officer rejected the claim and the Board ruled the appeal was untimely. It remarked, however, that if the claim was one for unliquidated damages for breach of warranty or for delay, it had no jurisdiction to award monetary relief. Rejecting the

8 UNITED STATES v. UTAH CONSTRUCTION.

Government's position that even if a claim sought only a remedy that was not available under Articles 3, 4 or 9, it nevertheless was within the scope of the disputes clause and subject to "final" administrative determination, the Court of Claims held that unless the claim sought relief for a "change" under Article 3 or "changed conditions" under Article 4 or "excusable delay" under Article 9 and was adjustable by the terms of those provisions, the claim was not within the disputes clause, was not subject to administrative determination and was a matter for *de novo* trial and decision in the proper court.⁴

II.

We deal first with the issue of the scope of the disputes clause which is raised by the Court of Claims' treatment of the concrete aggregate claim. The Government reasserts here its position in the Court of Claims⁵ that the disputes clause authorizes and compels administrative action in connection with all disputes arising between the parties in the course of completing the contract. In its view, the disputes clause is not limited to those disputes arising under other provisions of the contract—Articles 3, 4 and 9 in this case—that contemplate equitable adjustment in price and time upon the occurrence of the specified contingencies. If the Government is correct, the concrete aggregate claim was a proper sub-

⁴ The court did not decide whether or not the substandard aggregate was or was not a "changed condition" under Article 4. This matter it referred back to the Commissioner. It did hold, however, that if the claim fell within Article 4, and if the Board of Appeals had erroneously refused to hear it as untimely, court proceedings should be suspended until appropriate administrative action was completed. This latter determination the Court of Claims refused to follow in No. 439, *United States v. Anthony Grace & Sons, Inc.*, *post*.

⁵ Before the Advisory Board of Contract Appeals the Government asserted a contrary position. See n. 7, *infra*.

ject for administrative handling even if the substandard aggregate was not a changed condition within Article 4 and even if the claim was for breach of warranty and delay damages. From this and from the Government's position in *United States v. Anthony Grace & Sons, Inc.*, *post*, p. —, which we sustain, it would follow that the factual issues underlying this claim were not subject to a *de novo* trial in the Court of Claims.

We must reject the government position, as did all the judges in the Court of Claims. The power of the administrative tribunal to make final and conclusive findings on factual issues rests on the contract, more specifically on the disputes clause contained in Article 15. This basic proposition the United States does not challenge; and the short of the matter is that when the parties signed this contract in 1953, neither could have understood that the disputes clause extended to breach of contract claims not redressable under other clauses of the contract.⁶ Our conclusion rests on an examination of uniform, continuous, and long-standing judicial and administrative construction of the disputes clause, both before and after the contract here in question was executed. Reference to decisions subsequent to 1953 is justified in many cases as a practical construction of the clause by one of the contracting parties, the Government (for it has frequently been the Government that has

⁶ When the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract. See *Morrison-Knudsen Co. v. United States*, 345 F. 2d 833 (Ct. Cl. 1965); Shedd, *Disputes & Appeals: The Armed Services Board of Contract Appeals*, 29 *Law & Contemp. Probs.* 39, 74 (1965); Kelly, *Government Contractors' Remedies: A Regulatory Reform*, 18 *Admin. L. Rev.* 145, 147 (1965). For ease of reference we will therefore use the term "breach of contract claims" to refer to contract claims that are not redressable under specific contract adjustment provisions.

10 UNITED STATES v. UTAH CONSTRUCTION.

urged a narrow construction of the disputes clause on the various Boards of Contract Appeals),⁷ and in any event as showing the construction on which innumerable other government contractors may have relied in not presenting breach of contract claims to the contracting officer, which claims would now be forever barred under the Government's interpretation by the contractual time limitations on the presentation of claims and appeals.⁸

Beginning in 1937, a series of cases in the Court of Claims decided prior to the execution of this contract had established that the jurisdiction of the Boards of Contract Appeals under the disputes clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly that the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action. See, e. g., *Phoenix Bridge Co. v. United States*, 85 Ct. Cl. 603, 629-630 (1937); *Plato v. United States*, 86 Ct. Cl. 665, 677-678 (1938); *John A. Johnson Contracting Corp. v. United States*, 119 Ct. Cl. 707, 745, 98 F. Supp. 154, 156 (1951); *Continental Illinois Nat'l Bank v. United States*, 126 Ct. Cl. 631, 640-641, 115 F. Supp. 892, 897 (1953). That has continued to be the view of the Court of Claims. E. g., *Railroad Waterproofing Corp. v. United States*, 133 Ct. Cl. 911, 915-916, 137 F. Supp. 713, 715-716 (1956); *Ekco Products Co. v. United States*, 312 F. 2d 768, 773 (1963); see also *Hunter v. United States*, 9 C. C. F., ¶ 72,647 (D. C. E. D. N. C. 1963), aff'd *per curiam*, 331 F. 2d 741 (C. A. 4th Cir. 1964).

⁷ With respect to the concrete aggregate claim in this case, for example, the attorney appearing for the contracting officer moved to dismiss for lack of jurisdiction on the ground that the claim was for breach of contract, rather than for an equitable adjustment under Article 4, and did not fall within the coverage of the disputes clause.

⁸ By contrast, the period of limitations for contract actions in the Court of Claims is six years. 28 U. S. C. § 2501 (1964 ed.).

After its creation in 1942, the War Department Board of Contract Appeals quickly accepted the principle established by the *Phoenix Bridge* and *Plato* cases, *Boyer t/a Harry Boyer, Son & Co.*, 1 C. C. F. 53 (1943); *Kirk t/a Kirk Bldg. Co.*, 1 C. C. F. 67, 70-71 (1943), and long prior to 1953 it was the settled practice of the various Boards to refuse to consider pure breach of contract claims, *e. g.*, *Asbestos Wood Mfg. Co.*, 2 C. C. F. 203 (WDBCA 1944); *Specer B. Lane Co.*, 2 C. C. F. 500, 505 (WDBCA 1944); *Rust Engr. Co.*, 3 C. C. F. 1210 (NDBCA 1945). The United States, indeed, grudgingly concedes that the boards "have frequently, and perhaps usually," declined such jurisdiction. Such rulings are in fact legion, see, *e. g.*, *Dean Constr. Co.*, 1965-2 B. C. A., ¶ 4888 (GSBCA 1965); *Prototype Development, Inc.*, 1965-2, ¶ 4993 (ASBCA 1965); *Electrical Builders, Inc.*, 1964 B. C. A., ¶ 4377 (IBCA 1964); *E. & E. J. Pjotzer*, 1965-2 B. C. A., ¶ 5144 (Eng. B. C. A. 1965), and the decisions cited therein and in the decision below, 339 F. 2d, at 616, n. 2 (Davis, J., dissenting and concurring), and include decisions of the bodies appointed to administer the disputes clause on behalf of the Atomic Energy Agency, the contracting agency in this case, see *Claremont Constr. Co.*, Dkt. No. 64 (Feb. 14, 1955); *Frontier Drilling Co.*, Dkt. No. 74 (July 1, 1955); *Utah Constr. Co.*, Dkt. No. 91 (Dec. 12, 1956); *J. A. Tiberti Constr. Co.*, Dkt. No. CA-126 (May 2, 1961); but cf. *Fick Foundry Co.*, 1965-2 B. C. A., ¶ 5052, at 23,786. The AEC Advisory Board of Contract Appeals reaffirmed this interpretation of the disputes clause in its discussion of respondent's concrete aggregate claim, see, *supra*, p. —.

The United States does not dispute the fact that the past construction of the standard disputes clause has been that it does not authorize the Boards of Contract Appeals to finally determine, and to grant relief for, all

12 UNITED STATES v. UTAH CONSTRUCTION.

claims related to the contracted work.⁹ Instead, it attacks these rulings of the Court of Claims and the Boards of Contract Appeals concerning the scope of the standard disputes clause as erroneous and premised on principles that have since been rejected in other cases. But even if, as an original matter, the language of the disputes clause might have been susceptible to the interpretation urged by the Government, the restrictive meaning of the words "arising under this contract" had long since been established when these parties used them in 1953. The question before us is what the parties intended, not whether the construction on which they relied was erroneous.

The United States, as an alternative argument, would limit the rulings described above to the question of availability of remedy, and it contends that even if it be accepted that the Boards of Contract Appeals are without jurisdiction to grant relief for breach of contract they are nevertheless authorized by the disputes clause to make binding findings of fact respecting all disputes. The argument is premised in the main on certain unique provisions in the charter of the Armed Services Board of Contract Appeals, which is the successor to the War Department Board of Contract Appeals. Special attention to the ASBCA is justified by its large caseload and its consequent importance as a model for the development of other Boards.

Originally the WDBCA took a narrow view of its jurisdiction, see Shedd, Disputes and Appeals: The Armed

⁹ The Government does assert that the NASA Board of Contract Appeals "apparently asserts jurisdiction for some purposes over claims for breach of contract," citing *Doyle and Russell, Inc.*, 1965-2 B. C. A., ¶ 4912. The purpose for which the Board asserted jurisdiction, however, was to determine whether it had authority to grant relief, and the Board also noted that the contractor had asserted a claim for additional compensation under the changes clause.

Services Board of Contract Appeals, 29 Law & Contemp. Probs. 39, 55 (1964), and as a result the Secretary of War issued on July 4, 1944, a memorandum directing the Board, *inter alia*, to

"[f]ind and administratively determine the facts out of which a claim by a contractor arises for damages against the Government for breach of contract, without expressing opinion on the question of the Government's liability for damages." 9 Fed. Reg. 9463.

Similarly, the present charter of the ASBCA provides that

"[w]hen in the consideration of an appeal it appears that a claim is involved which is not cognizable under the terms of the contract, the Board may, insofar as the evidence permits, make findings of fact with respect to such a claim without expressing an opinion on the question of liability." 32 CFR § 30.1, App. A, Part I, § 5.

It will be noted that on their face the very provisions on which the Government relies in this phase of its argument conclusively refute the broader contention that the Boards may determine and afford relief for all contract claims, for they recognize that some claims for breach of contract may not be "cognizable under the terms of the contract" and that in such cases the Boards should express no opinion on the question of liability.¹⁰ Nor do the provisions, in terms, provide any support for the view that the Boards may make binding, as distinguished from advisory, findings of fact.

In the first case before the WDBCA under the 1944 directive, the Board ruled that it would retain jurisdic-

¹⁰ The ASCBA has also interpreted this charter provision as recognizing the narrow interpretation of the disputes clause. *Lenoir Wood Finishing Co.*, 1964 B. C. A., ¶ 4111, at 20,060-20,061.

14 UNITED STATES v. UTAH CONSTRUCTION.

tion to hold a hearing and to make findings of fact even though it expressly recognized it could grant no relief and it was "doubtful whether any findings the Board should make . . . would be given any consideration by a court" *Columbia Constructors, Inc.*, 2 C. C. F. 942 (WDBCA 1944). Such willingness to make findings even though no hearing had theretofore been held was in keeping with the dual function of adjudicatory body and advisor to the Secretary then exercised by the WDBCA, which heard appeals on an advisory basis in the case of contracts that did not authorize the designation of a board as the representation of the Secretary to hear appeals, see generally Smith, *The War Department Board of Contract Appeals*, 5 Fed. B. J. 74, 77 (1943), and sometimes investigated claims for extraordinary relief under Title II of the First War Powers Act, 55 Stat. 838 (1941), see *Ardmore Constr. Co.*, 3 C. C. F. 255, 265 (WDBCA 1944). Subsequently the contractor's appeal in the *Columbia Constructors* case was dismissed when the contractor represented that he did not desire a hearing if the Board could award no relief, thus confirming the parties' understanding that the 1944 memorandum did not require presentation to the WDBCA of all contract disputes as a prerequisite to a court action. 2 C. C. F. 1162 (WDBCA 1944). In later cases where a hearing had been held in connection with other claims the WDBCA did make special findings, but without any intimation that such findings were to have binding effect. *E. g.*, *Swords-McDougal Co.*, C. C. F. 238 (WDBCA 1944); *Fiske-Carter Constr. Co.*, 3 C. C. F. 415 (WDBCA 1945); *Hargrave t/a Hargrave Constr. Co.*, 3 C. C. F. 1113, 1120 (WDBCA 1945).

The practice of the ASBCA has evidenced an even narrower understanding of the charter provision authorizing findings without expression of opinion on liability. In

cases heard on the merits prior to decision of the jurisdictional question the Board has made special findings in accordance with the charter. See *Specialty Assembling & Packing Co.*, 1959-2 B. C. A., ¶ 2370; *J. W. Bateson Co.*, 1962 B. C. A., ¶ 3293; see also the *Metrig Corp.*, 1963 B. C. A., ¶ 3658. But in *Simmel-Industrie Meccaniche Società per Azioni*, 1961-1 B. C. A., ¶ 2917, the Board rejected the contractor's contention that "[t]he ASBCA has jurisdiction and is under a duty to make findings of fact in this appeal even if it lacked jurisdiction to make an award to appellant," *id.*, at 15233. The Board interpreted the charter to mean that it would make special findings only in "appeals where a hearing on the merits has been completed prior to the filing of a rule to show cause or a motion to dismiss." *Id.*, at 15235. More recently the Board has explained that

"[g]enerally, as a matter of sound policy, the Board's discretionary right to make findings of fact in instances where a claim is not cognizable under the contract is not exercised, simply because the Board has no way to afford the parties the remedy which logically would flow from the facts found: The cases wherein the Board has declined to consider an appeal because it had no method within the confines of the contract terms to afford a remedy have sometimes been described, perhaps rather inaptly, as being beyond our jurisdiction or beyond our authority to consider. Basically, the lack is not of authority to hear but of authority finally to dispose administratively."

Lenoir Wood Finishing Co., 1964 B. C. A., ¶ 4111, at 20,061. As *Lenoir Wood Finishing Co.* indicates, the ASBCA, like the WDBCA, has disclaimed any binding effect for its findings in those cases where it has made special findings solely under authority of the spe-

cial charter provision. See also *Simmel-Industrie Meccaniche Societa per Azioni*, *supra*, at 15235; *J. W. Bateson Co.*, *supra*, at 16985. Since the ASBCA has declared it is not under any mandatory duty to make findings at a contractor's request in cases where it has no jurisdiction to grant relief, it would seem strange indeed to interpret the disputes clause as embodying the parties' understanding that such cases were nevertheless to be determined administratively.

Since it is so clearly established that the special charter authority to make findings without expression of opinion on liability does not expand the scope of the disputes clause or empower the Board to make binding determinations of fact, one may well ask what purpose such authority, and the findings made pursuant to it, can possibly serve. One obvious answer is that the Board's findings may facilitate a settlement of the contractor's breach of contract claim. For example, the General Accounting Office, which has statutory authority to settle claims against the United States, Budget and Accounting Act of 1921 § 305, 31 U. S. C. § 71 (1964 ed.), provides no procedure for resolution of factual disputes, 21 Comp. Gen. 244, and thus refuses to undertake settlement where there are substantial factual disputes, Comp. Gen. Dec. B-147326, May 25, 1962; Comp. Gen. Dec. B-149795, Jan. 4, 1963. Accordingly, acceptance by the parties of the Board's findings might provide the necessary requisite for intervention of the GAO.¹¹

¹¹ Of course such findings might also provide the foundation for action by other agencies authorized to compromise the claim or otherwise to grant relief, such as the Contract Adjustment Boards, see text, *infra*. With respect to the whole question of settlement, the Government contends that the early restrictive construction of the disputes clause was based in part on the belief that the various departments and their contracting officers had no authority to settle pure breach of contract claims, which view is asserted to have now

Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than *de novo*. This is not to say that the Government does not have a powerful argument for construing the disputes clause to afford administrative relief for a wider spectrum of disputes arising between the contracting parties. It can be argued, as the Government persuasively does, that the same considerations which initially led to providing an administrative remedy in those situations covered by such clauses as Articles 3, 4 and 9 of the contract also support the broader reading of the disputes clause permitting and requiring administrative fact finding with respect to all disputes arising between the contracting parties. But the coverage of the disputes clause is a matter susceptible of contractual determination, *United States v. Moorman*, 338 U. S. 457, subject to the limitations on finality imposed by the Wunderlich Act, and one would have expected modification of the disputes clause to encompass breach of contract disputes

been abandoned. See *Cannon Constr. Co. v. United States*, 319 F. 2d 173 (Ct. Cl. 1963). Since the authority of contracting officers to grant relief for all claims, through settlement, is now established, the argument continues, all contract claims may now be the basis of a dispute reviewable under the disputes clause. The error in this argument is that it fails to differentiate between an advance agreement to be bound by the decision of the contracting officer and the Board respecting an equitable adjustment and the power, without being bound prior to agreement, mutually to settle differences. This distinction has not escaped the ASBCA, which has ruled that although it subscribes to the view that contracting officers may negotiate settlements it has no power under the disputes clause to compel negotiation or settlement. *Lenoir Wood Finishing Co.*, 1964 B. C. A., ¶ 4111, at 20,061; accord, *John McShain, Inc.*, 1965-1 B. C. A., ¶ 4844 (GSBCA).

if the restrictive interpretation of Article 15 was thought unduly to hinder government contracting. In fact the contracting departments have not rejected the narrower judicial reading of the disputes clause nor attempted any wholesale revision of its language to cover all factual disputes. Instead they have acted to create alternative administrative remedies for some breach of contract claims and to disestablish others by fashioning additional specific adjustment provisions contemplating relief under the contract in specified situations not reached by such provisions as Articles 3, 4 and 9.

An example of the creation of alternative administrative remedies is afforded by the provisions in effect at various times since World War II, see First War Powers Act, Title II, 55 Stat. 838 (1941); Act of January 12, 1951, 64 Stat. 1257, authorizing extraordinary relief for certain claims of contractors. Pursuant to a delegation by the President under the statute presently in effect, Public Law 85-804, 72 Stat. 927, 50 U. S. C. § 1431 (1964 ed.), government departments and agencies exercising functions in connection with the national defense may, upon a finding that such action would "facilitate the national defense," enter into amendments and modifications of contracts without regard to other provisions of law respecting such amendments and modifications. As implemented by the departmental procurement regulations, see ASPR, 32 CFR § 17.000 ff.; AECPR, 41 CFR § 9-17.000 ff., the authority conferred encompasses amendments without consideration, correction of mutual mistakes, and formalization of informal commitments. This authority, which in many respects is analogous to power to settle claims, is delegated to Contract Adjustment Boards established within the departments and agencies concerned separate from the Boards of Contract Appeals. Because the regulations preclude resort to the powers conferred by Public Law 85-804 "unless other

legal authority in the department concerned is deemed to be lacking or inadequate." ASPR, 32 CFR § 17.205-1 (b)(ii), the Army Contract Adjustment Board has required contractors to exhaust remedies before the ASBCA under the disputes clause, *Blaw-Knox Co.*, ACAB Dkt. No. 1019, Nov. 2, 1960. However, in *Bendix Corp.*, ACAB Dkt. No. 1050, Sept. 11, 1962, which involved a claim for delay damages arising out of the Government's failure to make the construction site available on time, the Board ruled that the contractor need not present its claim to the ASBCA in view of that body's lack of jurisdiction over claims that were not premised on a provision for adjustment within the contract. Further, the ACAB confirmed that it was empowered to grant unliquidated damages for delay in breach of contract even though the contractor might also have a court action. Likewise, the Boards of Contract Appeals have consistently recognized that while they themselves may be without jurisdiction to grant relief for claimed breaches of contract, such claims, in appropriate cases, could be presented to the Adjustment Boards. See, e. g., *Fiske-Carter Constr. Co.*, 3 C. C. F. 415 (WDBCA 1945); *Ardmore Constr. Co.*, 3 C. C. F. 468 (WDBCA 1945); see generally Smith, *The War Department Board of Contract Appeals*, 5 Fed. B. J. 74, 82 (1943); cf. *Doyle & Russell, Inc.*, 1965-2 B. C. A. ¶ 4912, at 23,220 (NASA BCA). Thus it is quite evident from the administration of Public Law 85-804 and its predecessors that the limitations on the jurisdiction of the Boards of Contract Appeals are well understood by the military procurement departments and Congress.¹²

¹² The committee reports on Public Law 85-804 indicate that Congress was well aware that the powers conferred under Title II of the First War Powers Act had been used "to extend the time of performance on contracts and to waive liquidated damages provisions" and that "[a]mendments without consideration have also

An illustration of the disestablishment of breach of contract claims through the fashioning of additional contract adjustment provisions is provided by contractual provisions designed to deal with just such claims for delay damages as are presented here. In response to the importunings of Army contractors following this Court's ruling in *United States v. Rice*, 317 U. S. 61, that the contractor's remedy under Article 9 was limited to an extension of time, a "Suspension of Work" clause was adopted for use in construction contracts, see *T. C. Bateson Constr. Co.*, 60-1 B. C. A., ¶ 2552 (ASBCA 1960), at 12, 347-348,¹³ and has been the basis for administrative allowance of delay damages in numerous cases. A

been used to provide relief for defense contractors where losses have resulted from inequitable action of the Government" H. R. Rep. No. 2232, 85th Cong., 2d Sess., 4, 6 (1958); accord, S. Rep. No. 2281, 85th Cong., 2d Sess., 4, 5 (1958). The House subcommittee said that it had given particular attention to the regulations and administrative procedures employed under Title II and had found them to be proper. H. R. Rep. No. 2232, 85th Cong., 2d Sess., 7 (158). Congress thus acted upon the clear understanding that certain claims of the type the Government now contends to be covered by the disputes clause were not cognizable under normal contract adjustment procedures, thus necessitating the grant of extraordinary authority in Public Law 85-804.

¹³ A typical Suspension of Work clause provided:

"The Contracting Officer may order the Contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government. Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the Contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonable length of time, causing additional expense or loss, not due to the fault or negligence of the Contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly." *Barnet Brezner*, 1961-1 B. C. A., ¶ 2895, at 15, 119 (ASBCA). See also *T. C. Bateson Constr. Co.*, 1960-1 B. C. A., ¶ 2552, at 12319 (ASBCA).

more extensive clause for "Price Adjustment for Suspension, Delay, or Interruption of Work," ASPR, 32 CFR § 7.604-3 (1965 rev.), was promulgated in 1960 for optional use in Department of Defense fixed-price construction contracts. Effective April 1965, the clause was made mandatory in such contracts, ASPR § 7-602.46, 3 CCH Gov't Contracts Rep. ¶ 33,755.90,¹⁴ and the Armed Services Procurement Regulations Committee has proposed its use in fixed-price supply contracts as well. See generally Kelly, Government Contractors' Remedies: A Regulatory Reform, 18 Admin. L. Rev. 145, 148-152 (1965). An Interagency Task Group is currently re-

¹⁴ This clause provides:

"(a) The Contracting Officer may order the Contractor in writing to suspend all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

"(b) If, without the fault or negligence of the Contractor, the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed or interrupted by an act of the Contracting Officer in the administration of the contract, or by his failure to act within the time specified in the contract (or if no time is specified within a reasonable time), an adjustment shall be made by the Contracting Officer for any increase in the cost of performance of the contract (excluding profit) necessarily caused by the unreasonable period of such suspension, delay, or interruption, and the contract shall be modified in writing accordingly. No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted. No claim under this clause shall be allowed (i) for any costs incurred more than twenty days before the Contractor shall have notified the Contracting Officer in writing of the act or failure involved (but this requirement shall not apply where a suspension order has been issued), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption but not later than the date of final payment under the contract. Any dispute concerning a question of fact arising under this clause shall be subject to the Disputes clause."

22 UNITED STATES v. UTAH CONSTRUCTION.

viewing the clauses in the standard contract form, including the Changes, Changed Conditions and Suspension of Work clauses, to determine whether they should be expanded in coverage to prevent fragmentation of remedies. See 6 CCH Gov't Contracts Rep., ¶ 90,027, at 95,048. While in one respect it can be said that clauses broadening remedies under the contract have been adopted in response to restrictive interpretation of the disputes clause and express dissatisfaction with the unavailability of an administrative remedy, the fact that the response has taken this measured form has manifested the parties' reliance on the prior interpretation and has properly tended to reenforce it. As the ASCBA remarked in *Simmel-Industrie, supra*, "[i]t is noteworthy that when it is intended to provide an administrative remedy for Government delays, specific contract clauses have been developed and are set forth for that purpose," 1961-1 B. C. A., at 15234.

Finally, we may note that development of provisions such as the Suspension of Work Clause illustrates not only administrative acceptance of the narrow interpretation of the disputes clause; it also indicates the lack of any compelling reason for overturning that interpretation at this late stage. Inclusion of such additional clauses in the contract naturally limits the area of disputes falling outside the framework of contractual adjustment and thus outside the disputes clause, as does expansive construction of the existing adjustment clauses. As one member of the ASBCA has recently remarked:

"... government procurement agencies started several years ago adding various contract clauses designed to convert what would otherwise be claims for damages for breach of contract into claims payable under such contract clauses and, hence, to be regarded as 'arising under the contract.' This trend

has continued to the point where the field of claims for breach of contract that are not regarded as 'arising under the contract' is becoming very narrow indeed. Also there has been an increasing tendency for contract appeal boards to give a broad interpretation to contract clauses as vehicles for the administrative settlement of meritorious contract claims. Decisions where ASBCA dismisses an appeal for lack of jurisdiction as involving a claim for breach of contract are becoming increasingly rare." Shedd, Disputes & Appeals: The Armed Services Board of Contract Appeals, 29 Law & Contemp. Probs. 39, 74 (1964).

For the reasons stated we reject the Government's contention that the disputes clause covers all disputes relating to the contract.

III.

We are unable to accept, however, the Court of Claims' disposition of the Pier Drilling and Shield Window claims. Although the Board lacked authority to consider delay damages under these two claims, it did have authority to consider the requests for extensions of time under Articles 4 and 9, and these requests called for an administrative determination of the facts. Such findings, if they otherwise satisfy the standards of the Wunderlich Act, are conclusive on the parties, not only with respect to the Articles 4 and 9 claims but also in the court suit for breach of contract and delay damages. This finality is required by the language and policies underlying the disputes clause and the Wunderlich Act and by the general principles of collateral estoppel.

Both the disputes clause and the Wunderlich Act categorically state that administrative findings on factual issues relevant to questions arising under the contract

shall be final and conclusive on the parties.¹⁵ There is no room in the language of Article 15 or of the Act to consider factual findings final for some purposes but not for others. It would disregard the parties' agreement to conclude, as the Court of Claims did, that because the court suit was one for breach of contract which the administrative agency had no authority to decide, the court need not accept administrative findings which were appropriately made and obviously relevant to another claim within the jurisdiction of the board.

The position of the Court of Claims would permit erosion of the policies behind both the Wunderlich Act and the disputes clause. Any claim, whether within or without the disputes clause, can be couched in breach of contract language.¹⁶ The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics. Certainly, as the Court of Claims itself has since held, where the administrative agency has made relevant factual findings in the course of refusing relief which the contract authorizes it to give, the finality of these findings, if sufficiently supported, cannot be avoided in a court action for the same relief by labeling the refusal of an equitable adjustment as a breach of contract or by asserting that the primary issue involved is a question of law, *Morrison-Knudsen Co. v. United States*,

¹⁵ Of course, if the findings made by the Board are not relevant to a dispute over which it has jurisdiction, such findings would have no finality whatsoever. See Part II, *supra*; *Morrison-Knudsen Co. v. United States*, 345 F. 2d 833; *Utah Construction and Mining Co. v. United States*, 339 F. 2d 606, 617 (dissenting opinion of Judge Davis).

¹⁶ See the example given by the Court of Claims below, 339 F. 2d 606, 611, where the addition of the adjective "unreasonable" was felt sufficient to transform a dispute under the contract into a breach of contract claim. This position is now rejected. See n. 6, *supra*, and *Morrison-Knudsen Co. v. United States*, *supra*.

345 F. 2d 833; *Allied Paint & Color Works v. United States*, 309 F. 2d 133. Likewise, when the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried *de novo* in the Court of Claims when the contractor sues for relief which the board was not empowered to give.

This is no more than our decision in *Carlo Bianchi* requires. We there held that administrative findings in the course of adjudicating claims within the disputes clause were not to be retried in the Court of Claims but were to be reviewed by that court on the administrative record. This result, which was required both by the contract of the parties and by the Wunderlich Act, avoids "a needless duplication of evidentiary findings and a heavy additional burden in the time and expense required to bring litigation to an end," ¹⁷ 373 U. S., at 717, and it encourages the parties to make a complete disclosure at the administrative level, rather than holding evidence back for subsequent litigation. H. R. Rep. No. 1380, 83d Cong., 2d Sess., 5 (1954). These same reasons support the finality, in a suit for delay damages, of all valid and appropriate administrative findings already made in the course of resolving a dispute "arising under" the contract.

Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel.¹⁸ Occasionally courts

¹⁷ The Court of Claims observed, for example, that the testimony relating to the Shield Window claim took three days of the Board's time and the transcript runs 453 pages in length.

¹⁸ Judge Davis, in dissent below, wrote:

"This is the same general policy which nourishes the doctrine of collateral-estoppel. The court is reluctant, however, to apply that principle to these administrative findings because of the nature and

have used language to the effect that *res judicata* principles do not apply to administrative proceedings,¹⁹ but such language is certainly too broad.²⁰ When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Coal Co. v. Adkins*, 310 U. S. 381; *Hanover Bank v. United States*, 285 F. 2d 455;

genesis of the boards. The Wunderlich Act, as applied in *Bianchi*, should dispel these doubts. The Supreme Court made it plain that Congress intended the boards (and like administrative representatives) to be *the* fact-finders within their contract area of competence, just as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board are *the* fact-finders for other purposes. In the light of *Bianchi's* evaluation of the statutory policy, we should not squint to give a crabbed reading to the board's authority where it has stayed within its sphere, but should accept it as the primary fact-finding tribunal whose factual determinations (in disputes under the contract) must be received, if valid, in the same way as those of other courts or of the independent administrative agencies. Under the more modern view, the findings of the latter, at least when acting in an adjudicatory capacity, are considered final, even in a suit not directly related to the administrative proceedings, unless there is some good reason for a new judicial inquiry into the same facts. See Davis, Administrative Law 566 (1951); *Fairmont Aluminum Co. v. Commissioner*, 222 F. 2d 622, 627 (C. A. 4, 1955). The only reasons the majority now offers for a judicial re-trial of factual questions already determined by valid board findings are the same policy considerations which Congress and the Supreme Court have already discarded in the Wunderlich Act and the *Bianchi* opinion."

For a frequently quoted and similar position relating to the finality to be given to findings of an arbitrator, see *Bower v. Eastern Airlines*, 214 F. 2d 623, 626.

¹⁹ *Pearson v. Williams*, 202 U. S. 281; *Churchill Tabernacle v. FCC*, 81 U. S. App. D. C. 411, 160 F. 2d 244.

²⁰ See generally, 2 Davis, Administrative Law Treatise §§ 18.01-18.12 (1958); Groner & Sternstein, *Res Judicata in Federal Administrative Law*, 39 Iowa L. Rev. 300 (1954).

Fairmont Aluminum Co. v. Commissioner, 222 F. 2d 622; *Seatrains Lines, Inc. v. Pennsylvania R. Co.*, 207 F. 2d 255.²¹ See also *Goldstein v. Doft*, 236 F. Supp. 730, aff'd 353 F. 2d 484, cert. denied, — U. S. —, where collateral estoppel was applied to prevent relitigation of factual disputes resolved by an arbitrator.

In the present case the Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.²²

Accordingly, in light of the above, we affirm the Court of Claims in its interpretation of the scope of the disputes clause and we reverse as to its failure to give finality, in the suit for delay damages and breach of contract, to factual findings properly made by the Board.

It is so ordered.

²¹ *Commissioner v. Sunner*, 333 U. S. 591, and *United States v. International Building Co.*, 345 U. S. 502, clearly contemplated the application of principles of *res judicata* to administrative findings, although for other reasons in those cases, *res judicata* wasn't applied.

²² Had the contractor not sought an extension of time in this case, he would have forfeited this relief "under the contract" for failure to exhaust administrative remedies. But, at the same time, the findings which the Board made in connection with the time extension claim would not then have been available for introduction in the breach of contract action for relief not available under the contract.